SC CIV 97 008

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GOODZECK CONSTRUCTION LTD.

Plaintiff

AND:

ARCTIC TEREX LTD.

Defendant

REASONS FOR JUDGMENT
of Mr. Justice H.C.B. Maddison

At the time when the events giving rise to these proceedings took place, Bryan Staples was a salesman in the Hay River branch of the Defendant Company, Arctic Terex Ltd. ("Terex"). Goodzeck was at that time, and is now, President and General Manager of the Plaintiff Goodzeck Construction Ltd. ("the Plaintiff").

Staples and Goodzeck had discussions in April and the early part of May, 1972, at some time during which Staples told Goodzeck that Terex had made a bid to the Government of the Northwest Territories Department of Public Works to lease to the Government of the Northwest Territories (herinafter "the Government") a twin powered scraper for the period May 30th, 1972, to September 30th, 1972, for the sum of $26,000.00. The time for opening the bids had not yet come and Staples suggested to Goodzeck that the Plaintiff, which was in the highway construction contracting business, might also like to bid. The purpose of advising Goodzeck of the price at which Terex bid was for the purpose of enabling the Plaintiff

which was an equipment-purchasing customer of Terex to bid as well. Staples had tendered on behalf of Terex in the hope that it would result in the sale of a machine by Terex to someone, such as the Plaintiff, who was in the business of supplying such equipment on a short term rental basis. The arrangement was that if either the Plaintiff or Terex were awarded the contract, the scraper would be supplied by the Plaintiff; the Plaintiff having first obtained the scraper from the Defendant on terms. Terex knew the Plaintiff to be financially over-extended and unable to purchase such a machine outright.

The Plaintiff bid $26,600.00 and in due course, on May 26th, 1972, Staples and Goodzeck heard informally of the fact that Terex had been the successful bidder. On that day Goodzeck on behalf of the Plaintiff, signed a purchase order (Exhibit 1) for one scraper of the type required by the Government for the sum of $93,365.00. The Plaintiff paid a deposit of $1,000.00. At the foot of the purchase order Staples wrote in on behalf of Terex the word "Terms" and thereafter the following words:

> "Set up as rental-purchase @ $5300. per month with 4 months guaranteed and then convert to finance. 9% interested (sic) to be charged on outstanding balance."

In the space provided on the printed purchase order under "Down Payment" the figure "$1,000.00" was filled in by Staples opposite the printed word "cash". In the body of the purchase order the $1,000.00 was shown as a deposit and was deducted from the total purchase price of $93,365.00 leaving a balance of $92,365.00. In the space for "Terms on Balance," Staples wrote in "finance C.A.C.". The serial number of the unit had been obtained by Staples from Edmonton and inserted. In another place on the face of the document the following appears:

"This Order is not binding on the part of Arctic Terex Ltd. until accepted by the management." There then follows a line after the words "accepted by" and that was signed by Lloyd Hirning, Hay River Branch Manager of Terex, a person properly authorized by Terex to do so. The last line at the foot of the printed purchase order says "Title of these Chattels shall remain in the name of Arctic Terex Ltd. until paid in full."

Goodzeck took delivery of the scraper in Edmonton on May 29th, 1972, and brought it back to Hay River a day or two later.

In the meantime, the Government had decided to defer the commencement of the lease until June 9th, 1972, and wrote to tenderers to this effect by form letter dated May 26th, 1972. The Plaintiff received its copy of this letter, Exhibit 20. The Plaintiff put the scraper to work elsewhere in the interim.

Before May 26th, 1972, the Government had already indicated to Staples that it would require to rent two twin powered scrapers instead of one. Before June 9th, 1972, the commencement date was delayed until June 30th, 1972, the contract period thereby being diminshed by one month. On June 8th, 1972, Terex made a quotation to the Government Department of Public Works for rental of two twin powered scrapers for the shortened period of the proposed lease for the total sum of $39,000.00 at $6,500.00 per month per scraper.

As a result of the likelihood that Terex would receive the contract to supply the two scrapers as well as other incidental items upon which it had bid, Staples and Goodzeck had further discussions. The upshot of those discussions was that the Plaintiff paid a deposit of $1,000.00 on a second scraper of the variety specified by the Government and another purchase

order (Exhibit 2) was signed by Goodzeck on behalf of the Plaintiff on June 12th, 1972, specifying a price of $94,765.00. On this purchase order Staples again wrote the word "Terms" and under it wrote:

> "Set up as rental-purchase @ $5,300. per month with 4 months guaranteed and then convert to finance. 9% interest to be charged on the outstanding balance."

As in the case of the purchase order of May 26th, 1972, the serial number was filled in and the purchase order was completed in substantially the same form except that in the printed square entitled "Terms on Balance" Staples wrote in "as arranged". This purchase order was also signed by an officer of Terex and contained in its printed part the same statement about title remaining in Terex until paid in full. The $1,000 was deducted from the purchase price and the total was shown after deduction as $93,765.00.

At the same time Staples wrote in on both this document and the previously executed document of May 26th, 1972, (Exhibit 1) the following additional words under the same heading "Plus work in lieu of Government contract at $20.00 per hour."

The Plaintiff took delivery of the second scraper on June 14th, 1972, in Edmonton and had one of its employees bring it to Hay River where it arrived a couple of days later.

Owner protection plan documents were made up by Terex in the name of the Plaintiff and sent to the Plaintiff on June 2nd, 1972, and June 20th, 1972, respectively.

The Government awarded Terex the contract and on

July 3rd, 1972, the first working day after June 30th, 1972, the Plaintiff delivered both scrapers to the Government. They were, by the terms of the agreement, to be leased by the Government until September 29th, 1972.

Terex advised Goodzeck that they would credit to the Plaintiff toward the purchase price the full rental payments received from the Government. Terex does not, in the normal course of business, enter into short term rentals, its prime purpose is to sell heavy equipment.

Unbeknownst to the Plaintiff, on the same day that Terex had quoted on the lease of the two scrapers to the Government, namely, June 8th, 1972, Terex had also quoted to the Government the price of $172,070.00 for the sale of the two scrapers at the end of the lease contract. By the terms of that quotation, 100% of the rent was to apply to the purchase price and the Government was to receive a "4% cash no-trade discount" at the time of purchase on the balance remaining at that time. The Plaintiff first heard about this on July 10th, 1972, from the local Government supervisor of the machines which were being used by the Adult Vocational Training School on a project at Hay River.

Goodzeck went to Staples who confirmed that the Government had an option to purchase the two machines at the end of the three month contract period but he assured Goodzeck that the Government would not have the money available with which to purchase the machines at the end of the lease period.

During this period, the Plaintiff had been using the scrapers for other jobs during the hours in which they were not being used by the Government. This was a source of complaint by the local Government supervisor who felt that the machines should not be thus used because of the Government's option to

purchase. Discussions were held between Staples, Goodzeck and the local Government supervisor as a result of which the Government, by letter of October 20th, 1972, agreed to accept payment at the rate of $20.00 per hour for the use of each scraper by the Plaintiff after July 4th, 1972. Terex invoiced the Plaintiff for 435 hours at $20.00 namely $8,700.00 and it was promptly paid by the Plaintiff. Later the Plaintiff promptly paid to Terex the sum of $7,020.00 for further hours of use, invoiced by Terex at the rate of $20.00. Terex credited the Government the total of both sums, namely $15,720.00, against its rent.

On September 20th, 1972, the Government requested from Terex an extension to continue its rental of the two scrapers. The first extension to October 15th, 1972, was verbal. An extension agreement was entered into on November 30th, 1972, extending the termination date of the rental period from Terex to the Government from September 29th, 1972, to March 31st, 1973. The Plaintiff acquiesced in both extensions.

Contrary to the assurances which the Plaintiff had received, the Government elected to purchase the two scrapers for the sum of $172,070.00 plus certain additions for interest and repairs. A credit in the sum of $117,000.00 representing the total rental invoices was given to the Government by Terex against the sale price.

The Plaintiff did not tell Terex at the end of September or at any other time that it wanted to "convert to finance". Nor did the Plaintiff pay or tender any further sums to Terex towards the purchase price. The Plaintiff endeavoured, in November, 1972, to find financing to convert. It was unable to do so partly because the finance companies, in the light of the Plaintiff's financial condition, required, for their security,

recourse against the vendor, Terex, which Terex refused to grant. It would not have served the purposes of Terex, by that time, to provide recourse although it must have known at the outset, given the financial plight of the Plaintiff, that the Plaintiff would require its assistance.

Terex made no enquiry of the Plaintiff as to why it wasn't converting. Terex contends that because there was no "conversion to finance" its obligation to the Plaintiff was at an end and that all it was required to do was refund the $2,000.00 to the Plaintiff, which it did by way of crediting another account of the Plaintiff.

No registration was made by the Plaintiff under the *Bills of Sale* Ordinance and no registration was made by Terex under the *Conditional Sales* Ordinance.

The Plaintiff sues for an order declaring the Plaintiff's equity in the said machines, an order directing that the machines be delivered to the Plaintiff, damages for loss of income as a result of being unable to successfully bid on tenders requiring the two machines, and punitive damages in the sum of $20,000.00 as well as costs.

I permitted extrinsic evidence to enable me to ascertain what the real agreement was because of the ambiguity of the words "in lieu" in the phrase "plus work in lieu of Govt contract @ $20.00 per hour." I find that the meaning of the words "in lieu" as understood by both Goodzeck and Staples at the time Staples added the words into the agreements was "in addition to". This was a necessary provision in each contract, inserted belatedly by Staples with the acquiesence of Goodzeck, because of the intention of the Plaintiff to use the machines on other jobs during the hours the machines were not being used by the

Government under its rental agreement. Such extra hours of use would depreciate the machines more rapidly and in the event that the Plaintiff did not complete its purchase of the machines, the value of the interest of the unpaid vendor, Terex, in the goods would be diminished. Terex would be required to take back a more used piece of equipment than it had counted on. This clause was inserted by Staples before Terex entered into the rental option agreement with the Government. Upon the rental option document being executed it was not only the interest of Terex which required compensation for its diminution but also the interest of the Government who did not want, in the end, to be exercising an option to purchase a worn out machine unless it had been compensated appropriately for those hours of wear by another user.

I note, however, that when the Government brought the matter to the attention of Terex, Terex immediately started crediting all payments by the Plaintiff for its hourly use of the machine to the Government against the Government's monthly rent. A strange arrangement for Terex to enter into when it was at the same time assuring the Plaintiff that the Government would not be exercising its option. One would have thought that under such circumstances Terex would still be concerned about its own interest being worn out because it was still potentially liable to receive the goods back if the Government didn't exercise and its purchaser, the Plaintiff, didn't pay the full purchase price. I conclude that Staples, anxious at almost any cost to sell the equipment, knew that what he told Goodzeck about the unlikelihood of the Government exercising its option, was untrue.

The two contracts between Terex and the Plaintiff were founded upon the Government lease. When Terex agreed to the lease commencement date being put back one month, Terex waived the payment of the first of the four months' rent required

to be made by the Plaintiff under the contracts with Terex (Exhibits 1 and 2). Terex made no complaint about that at any time. Terex obviously accepted, had the Government lease been terminated at the end of three months, that the Plaintiff would pay another $5,300.00 for the fourth month (or $1,700.00 because the Plaintiff would already be ahead in its rent by $3,600.00) and then convert.

The fact of Terex agreeing before the end of the third month to a lease extension to the Government to five months had the effect of assuring the Plaintiff that it would continue to receive credit for the fourth and fifth months' rent. That induced the Plaintiff to believe that Terex was no longer insisting upon a fourth-month conversion, that the conversion to finance would be left in abeyance until at least the end of the fifth month. Before that time, the lease to the Government was extended by Terex until March, 1973. Terex made no mention to the Plaintiff of its failure to convert and the Plaintiff was thereby induced to believe that there was no necessity to convert at least until March 31st, 1973. Because of the conduct of Terex the Plaintiff acted to its detriment and Terex should not be allowed to rely on the Plaintiff's failure to convert to avoid the Plaintiff's claim.

In *Birmingham and District Land Co. v London and North Western Rail. Co.* (1888), 40 Ch. D. 268, at p. 286, Bowen, L.J. said this:

> "If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were in before."

In *Charles Rickards, Ltd. v Oppenheim*, [1950] 1 K.B. 616 at p. 623, Denning, L.J. said this:

> "If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

Cheshire and Fifoot call this "quasi-estoppel": 8th Edition, page 535.

As Judson, J. pointed out in *Conwest Exploration Co. v Letain* (1964) 41 DLR (2d) 200, the principle was recognized in Canada by Duff, C.J.C. in *Pierce v Empey* (1939) 4 DLR 672 at page 674. Judson, J. was of the opinion that the line of English cases, two of which I have cited, *supra*, commencing with *Central London Property Trust, Ltd. v High Trees House, Ltd.* [1947] K.B. 130, have done nothing more than restate the principle.

Terex intended the Plaintiff to act upon its waiver. In the embarrassing position in which Staples (and hence Terex) found itself Terex hoped that it could solve its problem by inducing the Plaintiff to ignore the deadline and then claim strict compliance.

After inducing the Plaintiff to ignore the fourth-month deadline, Terex's contention that the contracts with the

Plaintiff were terminated because of the Plaintiff's failure to convert, to be supportable, would in the circumstances, have to be based upon reasonable notice by Terex to the Plaintiff that it required the Plaintiff to convert or lose its thousands of dollars of equity in the machines. Having waived the deadline, no repudiation of the waiver by Terex would be effective except a clear intimation to the Plaintiff that it proposed to resume its strict rights: *Tool Metal Manufacturing Co., Ltd. v Tungsten Electric Co., Ltd.*, [1955] 2 All E.R. 657; [1955] 1 WLR 761.

Apart from reasonable notice of the repudiation of the waiver, the earliest possible date at which Terex, by its conduct, could expect the Plaintiff to convert was March 31st, 1973. Well before that time, the Plaintiff had been advised by Terex that the Government would likely exercise its option and he took legal advice. His then solicitors contacted Terex.

Terex having wrongfully repudiated the contract by offering to sell the same goods to the Government making it impossible for the Plaintiff to exercise its option, the Plaintiff was not bound to prove that it was ready, willing and able to convert. *British and Beningtons, Limited v North Western Cachar Tea Company, Limited and Others* [H.L.] [1923] AC 48.

In addition to the arm's length relationship involved in the rental-option from Terex to the Plaintiff, Terex, in my view, acted as agent of the Plaintiff in securing the Government lease and in receiving monthly rental payments from the Government. That is the only explanation which satisfactorily explains why the Plaintiff delivered the two machines to the Government. It accords with the realities of the situation inasmuch as Terex was the acknowledged agent of the Plaintiff in providing other

minor rental equipment to the Government during the first part of the same period for which Terex accounted to the Plaintiff for the rents received.

Terex exceeded its authority in entering into the option to the Government. The Plaintiff tacitly agreed *ex post facto* to the Government option because of the assurances given to Goodzeck by Staples that the Government would not exercise its option. These assurances were given cavalierly and with lack of candour. Staple's lack of candour was also evidenced by his failure to inform the Plaintiff of the option to the Government. One wonders if the Plaintiff would have heard of the option prior to March 31st, 1973, had the Government supervisor not complained about the extra hours of usage. Staples, inexperienced and anxious to complete the rental agreement with the Government which had been the justification for his prior contract with the Plaintiff, entered into the irrevocable offer to sell to the Government largely through ignorance. His conduct throughout was not the forthright conduct expected of a fiduciary.

The Plaintiff should have the value of its equity in the machines.

The Government paid to Terex the sum of $117,000.00 over the 9 months the machines were rented to the Government. That, plus the $2,000.00 comprising the down payments, would have been the equity of the Plaintiff in the machines at the end of March, 1973, if Terex had done what it agreed to do, namely, credit the $6,500.00 per month to the account of the Plaintiff. That is the sum of money which will compensate the Plaintiff.

The $20.00 per hour payments made by the Plaintiff were not contemplated by the parties to increase the equity

of the Plaintiff in the machines but were to protect Terex against excessive wear.

The damages for loss of income have not been proven.

This is not a case for punitive damages.

As the Plaintiff has already received a credit of $2,000.00, there will be judgment for the Plaintiff for $117,000.00 and costs.

Terex will have judgment for its counterclaim in the sum of $1,295.89, without costs, the sum to be set off against the judgment for the Plaintiff.

Whitehorse, Yukon,
July 22nd, 1977.

Maddison, J.

Counsel for the Plaintiff — Barry R. Berman, Esq.
L. G. L. Mar, Esq.

Counsel for the Defendant — Robert Halifax, Esq.

NO. SC 2473

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

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Plaintif

AND:

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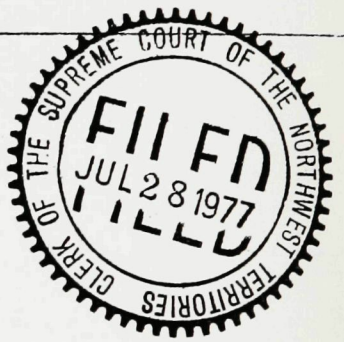

REASONS FOR JUDGMENT
OF MR. JUSTICE H. C. B. MADDIS