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Jan. 24

IN THE MATTER OF THE PETITION OF RIGHT OF

DUSSAULT AND PAGEAU, CONTRACTORS, SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Building contract—Default—Forfeiture—Recovery—Exchequer Court Act, sec. 49.

The suppliants entered into a contract with the Crown for the construction and completion of a landing pier, and before completion threw up their contract, making themselves thereby guilty of a breach of contract. The Crown had the pier constructed at a saving of $1,568.41 and the suppliants brought suit to recover this sum of $1,568.41, together with the further sum of $3,600, the amount of their deposit at the time of the signing of the contract.

Held, 1st, That the suppliants having become defaulting contractors are not under the terms of the contract entitled to the benefit of the saving on their contract price, when the works had been completed by others at a lower figure to the Crown.

2nd, That under the terms of the main contract and the subsidiary contract in respect of the deposit, where the Crown in the case of defaulting contractors has the works contracted for completed at a saving, the original contractors are entitled to recover their deposit.

Semble: That where the Crown at the time the contractors defaulted, availed itself of the forfeiture clause of the contract, as construed under sec. 49 of The Exchequer Court Act, (R.S.C. 1906, c. 140) after the works had been completed at a saving, it could not treat the deposit as forfeited under said sec. 49.

PETITION OF RIGHT to recover $20,390.34 on a contract for the construction of a Pier at Pointe aux Trembles, P.Q.

The case was tried at Quebec, before the Honourable Mr. JUSTICE AUDETTE, May 9 and Nov. 17, 1916.

I. N. Belleau and *A. Marchand*, for suppliant, and *F. O. Drouin*, K.C., for respondent.

AUDETTE J. (January 24, 1917) delivered judgment.

By an indenture bearing date June 28, 1904, the suppliant entered into a contract with the Crown, for the construction and completion of a landing pier, at Pointe aux Trembles, P.Q., "within 12 months of the signature" of the said contract as provided by paragraph three thereof;

and, by their amended petition of right they now seek to recover the sum of $20,390.34 in connection with the said contract under the circumstances hereinafter set forth.

At the end of the season of 1904, through alleged difficulty in obtaining timber, among other reasons relied upon by the suppliants, only a portion of the works had been performed, and during the winter of 1904-05 part of these works were damaged by the ice,—the whole as can be ascertained by reference to plan, Exhibit No. 10. This damage by the ice was, however, assigned, in the opinion of the engineer in charge, to improvidence and want of proper care or construction, but it has no bearing upon the case and is only mentioned as one link in the chain of facts.

Under the terms of the contract the works in question had to be constructed and completed by June 28, 1905, and by paragraph 18 thereof, time was deemed to be of the essence of the contract.

A few days before the expiry of this date within which the works had to be completed, namely on June 17, 1905, the suppliants requested the Minister to allow them to June 30, 1906, to complete and deliver the works. In answer to this request, on July 17, 1905, an extension of time was given them until November 25, 1905.

A second extension was given. On November 25, 1905, (Exhibit No. 13) the suppliants again asked for a further extension of time, within which to complete the work, to November 25, 1906. And in reply to this request, on November 27, 1905, an extension was given them to June 30, 1906. And it is well to note at this stage, that June 30, 1906, was the date mentioned by them in their first request for extension. They, therefore, did receve what they were asking on June 17, 1905, amounting to a complete year over and above the date mentioned in the contract. Upon the merits of the application reference should also be had to the views expressed by the local engineer, in Exhibit No. II.

A third extension was given on March 30, 1906, to August 1, 1906, as would appear by Exhibit "B." Furthermore, on June 23, 1906, Mr. Breen, the resident engineer, as will appear by Exhibit No. 16, acquaints the suppliants

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with the communication received on the 19th from the Chief Engineer, which reads as follows:

"My attention is called to the fact that the con-"tractors, Messrs. Dussault and Pageau, for the building "of the wharf at Point aux Trembles, have not yet resumed "work this Spring, would you kindly inform them in "*writing* that *unless they proceed with the work without* "*any further delay* the contract will be taken off their "hands, and their security deposit forfeited to the Crown. "Kindly attend to this matter at once, as the work must be "completed before the first of August next."

On July 7, 1906, the suppliants wrote the chief engineer (See Exhibit "A") acknowledging receipt of Mr. Breen's letter of June 23, 1906, and state: "En réponse, nous en "sommes venus à la conclusion que si le contrat doit nous "être enlevé le 1er août prochain, vaut autant cesser de "suite les travaux, et nous avons donné instruction a "Mr. Pageau de suspendre les travaux ce soir."

The suppliants had thrown up their contract and abandoned its completion.

A very unfortunate and injudicious course for them to have taken under the circumstances, especially in view of what had in the past happened between them and the Crown when they had asked extensions, which true were not at first granted to the full extent, but which were from time to time granted for delays longer than those previously requested. However, if the suppliants, on being urged to go on with their work, and asked to complete the pier more than one full year after the time assigned by their contract, felt offended and threw up and abandoned their contract, they will have also to take and assume the full responsibility of such a course amounting to a breach of their contract.

We have therefore to face the situation as it stands. It is perhaps unnecessary to say that while time was of the essence of the contract, and the works had to be completed within the year, by June 28, 1905, that that had been waived by giving the suppliants extensions of time within which to complete the works. And under such circumstances it would have been necessary to find whether or not that extension was reasonable, whether the contractors

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had reasonable time within which to complete their works. However, upon this point there is evidence in the affirmative both by the resident engineer, and by Poliquin. But this is a point which has become unnecessary to decide in view of the position taken by the suppliants in throwing up their contract. *Stewart v. The King*;[1] *Walker v. London & N.W. Ry. Co.*;[2] *Berlinquet v. The Queen*[3]. The suppliants have abandoned the work and left it unfinished and cannot be entitled to any further compensation. *Dakin v. Lee*[4]; See also *Beck v. Township of York*.[5] The contract is not at an end, and they cannot recover on a *quantum meruit*. The suppliants at the time they abandoned the contract left upon the premises materials consisting of lumber and iron to the value of $10,183.30, as set forth at page 12 of the specifications of Poliquin's contract and referred to in clause 18 thereof.

The suppliants have been paid the total sum of $15,300 together with the sum of $4,949.89 which the Crown paid to F. R. Morneault & Cie for lumber at the request and in discharge of the suppliants' liability, for lumber bought by them. This sum of $4,949.89 forms part of the $10,183.30 above referred to, and was paid *pro tanto* for part of the lumber left by the suppliants when they abandoned the works.

Now, at the argument, the suppliants' counsel rested his case upon the following contention. He says the contract price for the whole works, as between the suppliants and the Crown was.....$33,775.00
and the Crown has now received that wharf completed, and it is represented by that amount.

The Crown has also in its hands the suppliants deposit amounting to.....3,600.00

$37,375.00

[1] 7 Can. Ex. 55; 32 Can. S.C.R. 483.
[2] L.R. 1 C.P.D. 518.
[3] 13 Can. S.C.R. 26.
[4] [1916] 1 K.B. 566.
[5] 5 Ont. W.N. 836.

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To amount brought forward.....$37,375.00
The Crown confiscated our materials which are valued at..... 10,183.30
as shown in the specification of Poliquin's contract.
Then, Poliquin, the second contractor had extra work for the sum of..... 350.00

Making in all the sum of.....$47,908.30
which he contends is in the possession of the Crown and for its benefit.
Then he pursues, on the other branch of his argument, and says the suppliant received in cash.....$15,300.00
together with the further sum of..... 4,949.89
paid by the Crown, to their credit to Morneault & Cie, at their request

$20,249.89

And the Crown paid Poliquin to complete the works the sum of (contract price)..... 22,490.00

making in all.....$42,739.89
and he concludes by saying the Crown received$47,908 30
and paid..... 42,739.89

leaving a balance in our favour of.....$ 5,168.41
which the suppliant should recover.

Recapitulating counsel's figures, they would stand as follows:

As received by the Crown.

Pier.....$33,775.00
Extra work..... 350.00
Materials..... 10,183.30
Deposit..... 3,600.00

$47,908.30

As paid by the Crown.

To suppliant	$15,300.00
" credit of suppliant for lumber bought by them from Morneault & Cie	4,949.89
Contract price of Poliquin for completion of work	22,490.00
	$42,739.89
Concluding by saying the Crown should pay us the sum of	5,168.41

the difference between $42,739.89 and the sum of $47,908.30

The obvious fallacy of this argument lies in the fact, you cannot say the Crown received the completed pier, representing $33,775, together with the $10,183.30, because the latter sum is in the pier when it is representing the sum of $33,775.

There is double appropriation (double emploi) in stating on the one hand the Crown in the result received a pier of the value of $33,775, and on the other hand to say that the Crown over and above this $33,775 pier (contract price) it also received $10,183.30 of materials which have to go into the pier before it is completed and before it has acquired the value of $33,775.

Then on the other branch of his contention with respect to what the Crown has paid, he is again in error, because the Crown did not actually pay $22,490 to Poliquin to complete the works, because under the contract, the materials to the amount of $10,183.30 was used as part payment of the sum of $22,490 and in the $10,183.30 was also included the sum of $4,949.89 paid by the Crown to Morneault, at the request of the suppliants, being in part payment of the materials represented by the total sum of $10,183.30.

The true transaction would really stand, as follows:

The Crown received

Complete Pier	$33,775.00
" plus extras	350.00
	$34,125.00

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The Crown paid.

To the suppliants.....		$15,300.00
" Morneault & Cie at request of suppliants for lumber supplied.....		4,949.89
To Poliquin, the 2nd contractor who completed pier, the contract price being.....	$22,490.00	
Less the sum of..... representing the value of the materials left on the premises by the suppliants, and of which the Crown had already paid $4,949.89.....	10,183.30	
	$12,306.70	12,306.70
(The $350 extra shown on the credit side is included in the $22,490.00)		
		$32,556.59

Therefore, if from the total assets or the total sum received by the Crown, viz..... $34,125.00
is deducted, what the Crown actually paid..... 32,556.59

there would remain the sum of..... $ 1,568.41
showing that the Crown is to the good by that amount.
And if the amount of the deposit, viz..... 3,600.00
is added thereto, it would represent the total sum of.....
$ 5,168.41

Now the question which remains to be decided is whether, under the terms of the contract, the suppliants are entitled to recover this sum of $5,168.41.

The contract entered into by the suppliants is a contract substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractors are, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and are absolutely without any resource or remedy.[1]

[1] Bush v. Whitehaven Trustees. Hudson on Building Contracts (4th ed). Vol. II, p. 122.

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But in this case the suppliants themselves created the breach by throwing up the contract and by failing to complete the works, and it would be contrary to justice that a party should avoid his own contract by his own wrong.

It is unnecessary to review the several clauses of this contract into which the suppliants entered, with their eyes open. They must be held to them notwithstanding that they might appear oppressive., *Modus et conventio vincunt legem.* The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law.[1] The suppliants cannot reject the terms of the contract and claim remuneration as upon a *quantum meruit.*

Under clause II. of the contract all the materials provided by the contractors became the property of the Crown for the purposes of the pier, and upon the completion of the works only such materials which have not been used and converted in the work, upon demand may be delivered to the contractors. And this clause is by no means unusual, it is referred to in all the text books. It is a security to the building owner for the performance of the works, subject to this condition of defeasance if the builder fails to complete his works.[2] This is the law that must govern with respect to the materials and to this agreement and condition the contractors have bound themselves by their signature to the contract. And indeed, *Nullus commodum capere potest de injuria sua propria.*

The same principle is to be found enunciated in *Emden's Building Contracts* (4th ed.) p. 125, citing cases in support of the following proposition:

"Where the contract contains a clause vesting the materials "in the employer as they come on the land, it would seem "that, inasmuch as such a vesting clause is in effect a "security that the builder shall perform his contract, he "will be precluded from recovering such materials when "he has not completed." *Idem* also at pp. 121-124.

[1] Broom's Legal Maxims (8th ed.) p. 537.
[2] Hart v. Porthgain Harbour Co. [1903] I Ch. D. 690.

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And in the case of *Quinn v. United States*,[1] where the contractors were dismissed and others employed who did the work on much lower terms than those of the contract, it was held that the contractors were not entitled to either the profits they would have made if they had completed the contract or to the difference between the contract price and the actual cost of the work.

The case of *Hammond v. Miller*[2] is also authority for the principle that a defaulting contractor would not be entitled to the benefit of the saving on his contract price where the works had been completed by others at a lower figure to the employer.

I have come to the conclusion that the suppliants are not entitled to recover this sum of $1,568.41, the balance above referred to.

Coming now to the question of the deposit or security for the sum of $3,600 dealt with both under the specifications which are part of the main contract and under the subsidiary contract or agreement, with respect to the security, bearing same date as that of the original contract, it appears that the suppliants have delivered to the Crown certain securities and money, valued in the whole at $3,600, and more particularly described as two accepted cheques for the above named sum, dated Quebec, May 9th and June 10th, 1904, drawn on La Banque Nationale, signed Dussault & Pageau, and made payable to the order of the Honourable the Minister of Public Works for Canada. There is no evidence showing whether or not the cheques have been cashed, although it is to be assumed.

Paragraph 3 of clause 41 of the specifications which forms part of the contract, reads as follows: "Each tender "must be accompanied by an accepted bank cheque made "payable to the order of the Honourable the Minister of "Public Works for the sum of $3,600 which will be forfeited "if the party declines to enter into a contract when called "upon to do so, or if he fails to complete the work contracted "for. If the tender is not accepted the cheque will be returned."

[1] (1878) 99 U.S. 30.

[2] (1884) 2 Mackey (D.C.) 145; U.S. Dig. 1884, p. 141, cited in Hudson on Building Contracts (4th ed.) p. 617.

Clauses 3 and 4 of the subsidiary contract, which must be read together, are as follows:

"3. That upon full performance and fulfillment by the "contractors, of the said contract, and of all the covenants, "agreements, provisos and conditions as aforesaid the "parties hereto of the first part shall be entitled to receive "back the value of said security, together with the interest, "if any, which may have accrued out of the deposit whilst "in the hands of the Finance Department;

"4. But if at any time hereafter the said contractor "should make default under the said contract, or if His "Majesty acting under the powers reserved in the said "contract, shall determine that the said works, or any "portion thereof remaining to be done, should be taken "out of the hands of the contractors, and be completed "in any other manner or way whatsoever than by the "contractors, His Majesty may dispose of said security and "of the interest which may have accrued thereon for the "carrying out of the construction and completion of the "work of the contract and for paying any salaries and "wages that may be left unpaid by the said contractors."

Then sec. 49 of the Exchequer Court Act, enacts as follows:

"49. No clause in any such contract in which a draw-"back or penalty is stipulated for an account of the non-"performance of any condition thereof, or on account of "any neglect to complete any public work or to fulfil any "covenant in such contract, shall be considered as com-"minatory, but it shall be construed as importing an assess-"ment by mutual consent of the damages caused by such "non-performance or neglect."

Now paragraph 3 of clause 41 of the main contract and clauses 3 and 4 of the subsidiary contract must be considered together.

Under clause 41, and especially if read in the light of sec. 49 of the Exchequer Court Act, the moment the contractors defaulted and failed to complete the work contracted for, it would seem the Crown would have the right to say to the contractors, you having defaulted we treat your deposit of $3,600, under section 49 of the Act, not as a forfeiture but as *an assessment of the damages* by

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your default or neglect, and having done so much, no more no less could be done. That is the assessment of the damages was then made once for all, taking all prospective damages into consideration.

Then the Crown, in the present case, having failed to avail itself of clause 41, must then be taken to fall under clauses 3 and 4 of the subsidiary contract, whereby again in case of default by the contractor we fail on an actual assessment of the damages, when the Crown has a right to *dispose* of that security for the carrying out of the construction and completion of the work of the contract and for satisfying unpaid salaries and wages.

In the latter case, there is no assessment of the damages as provided by the statute—it is an actual assessment which takes place. The parties are to some extent at large, and the Crown would have, I suppose, its right of action for any loss (even for more than the $3,600) suffered by it from the contractor's default, and the pendulum of justice could then be swung both ways, and do actual and untrammelled justice between the parties according to the actual facts of the case, taking into consideration the position of the parties after the full completion of the works.

In the result the Crown having suffered no loss, but being to the good by $1,568.41, is bound to return the deposit.

Would it not on the other hand seem that sec. 49 of the Exchequer Court Act, only applied to cases in which the Crown has suffered damages. If, indeed, effect were given to sec. 49 where there be no damages, it clearly would defeat the very purpose and spirit of such section; because then, that is if we enforce the remedy provided by the section where there is no damages, but a gain, it would mean nothing else but a penalty or forfeiture in cases where there is no damages. It would clearly become a penalty as against the contractors if enforced against them in case the Crown suffered no damages.

And should not in any event this sec. 49, consistent with reason, receive a fair, large and liberal construction and interpretation as could best insure the attainment of the object of the Act and of such provision or enactment,

according to its true intent, meaning and spirit? *The Interpretation Act*, R.S.C. 1906, ch. I, sec. 15.

In the case of *Quinn v. United States* (*Ubi supra*) where the engineer in charge terminated the contract on the ground of undue delay, the court held that the State having suffered no loss by the failure of the contractors, that the latter was entitled to recover the ten per cent. retention money payable on completion of the works.

Moreover, if claim 41 of the main contract and clauses 3 and 4 of the subsidiary contract should be read together, the necessary meaning or inference would be that these $3,600 are to be returned to the contractors under two different circumstances. First, where under clause 3 of the subsidiary contract he has completed his work, this deposit is returned to him. And it is well to note that clause 41 of the main contract makes no provision as to the return of this money. And 2ndly, Where under clause 4 of the subsidiary contract the contractors have defaulted, and the Crown has not at the time of the default and before the completion of the works availed itself of the so-called forefeiture, qualified by sec. 49 of the Act, then it may dispose of this security for carrying out the construction and completion of the works and for paying any salaries or wages that may be left unpaid. But where the contractors have so defaulted and after the works have been completed by others and duly paid for, and furthermore where no salaries or wages remain unpaid, the same having been paid and satisfied out of the original contract price without any extra expense or loss to the Crown, but even at a small benefit—the contractors, it would seem, become entitled to their deposit under the view taken in respect to sec. 49 of *the Exchequer Court Act*, as above referred to.

Therefore, I must confess it is with some satisfaction I feel enabled to arrive at the conclusion, not without some hesitation, that the contractors are entitled to recover the amount of their deposit; because, after all in the result the works have been performed and completed without any loss to the Crown, but with a net gain of $1,568.41 which they have a right to retain under the contract. Further, because this security of $3,600 was in any event

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paid only as a guarantee for the due performance and completion of the works without any loss to the Crown. The Crown having the completed pier, and having suffered no loss but made a gain, the money should go back to the depositors or contractors.

Therefore, there will be judgment declaring that the suppliants are entitled to recover the sum of $3,600 and costs.

*Judgment for suppliant.**

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Drouin, Sevigny & Amyot.*

*NOTE.—On appeal to Supreme Court of Canada, this judgment was varied by the allowance of interest to the suppliants on the amount of the security deposited.