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*June 1, 2, 3
*Dec. 9

THE CORPORATION OF THE CITY OF OSHAWA (*Defendant*) ..... } APPELLANT;

AND

BRENNAN PAVING COMPANY LIMITED (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Construction of street—Payment for materials to be by weight and engineer's certificate condition precedent to payment—Effect of engineer's failure to comply with prescribed conditions.

A contract entered into by the appellant municipality with the respondent provided that as to the gravel and asphalt to be supplied by the latter, payment should be by weight, and that possession of an estimate or certificate signed by the appellant's engineer should be a condition precedent to the right of payment. The respondent complied with the provisions of the contract but the appellant's engineer refused to certify for the materials by weight and arrived at the amounts to be paid for each by his own methods of calculation.

Held: That when the engineer refused to certify, as called for by the contract, he abdicated his proper function thereunder and the appellant, having concurred in the position he took, brought itself within the principle of *Panamena* v. *Leyland* [1947] A.C. 428. The respondent was thus absolved from the requirement with respect to the final certificate and the construction of the contract became in the circumstances entirely a matter for the court.

Appeal dismissed and judgment of the Court of Appeal for Ontario [1953], O.R. 578, affirmed but varied by deducting $1,305.02, the value of 160·125 tons of asphalt, supplied in excess of the estimate.

APPEAL by defendant from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of the trial judge, McRuer C.J.H.C., (2) in favour of the plaintiff.

J. J. Robinette, Q.C. and *G. K. Drynan* for the appellant.

P. B. C. Pepper for the respondent.

The judgment of the court was delivered by:

KELLOCK J.:—With respect to the claim for gravel, Mr. Robinette relies only on the absence of a final certificate from the engineer. As to the asphalt, his position is two-fold: (1) that the claim for any amount over the 3000 tons mentioned in the specifications is irrecoverable for lack of an "order from the engineer in writing" as required by clause M of the General Conditions of Contract; and (2) that as to the remainder, it is in the same position as the gravel, namely, irrecoverable for lack of the engineer's certificate.

With respect to the gravel, it is provided by the specifications that the "basis of payment for this material shall be per ton, all material being weighed on the city weigh-scales by the city weigh-master and checked on the job by the inspector designated by the engineer." The engineer, in his final certificate, however, entirely disregarded this provision. What he did is thus described in the judgment of Roach J.A., who delivered the judgment of himself, Hogg and Gibson JJ.A.:

> He took the total surface area and multiplied it by 6 inches (the depth of gravel called for) and determined the total number of cubic yards. Then by adopting what someone told him was the weight of a cubic yard of gravel, he determined the quantity by weight of the total cubic yards. To that amount he added *something* as an allowance for gravel used in filling the voids in the rubble that was used to fill soft spots. How he could determine the quantity of gravel that was used in these soft spots I am totally unable to understand. He did not know the depth or area of the soft spots or the size of the voids.

This, of course, was not in accordance with the contract, and its construction is, in the circumstances, entirely a matter for the court. Clause F of the General Conditions upon which some reliance is put by the appellant has no bearing. It reads as follows:

> Work mentioned on the plans or specifications shall be performed as though shown on both. In the event of dispute, the decision of the engineer as to the meaning or intent of the plans and specifications shall be final.

(1) [1953] O.R. 578; 3 D.L.R. 17. (2) [1952] O.R. 540; 4 D.L.R. 81.

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While the gravel was being furnished to the job and worked into it, there was no dispute whatever as to what was called for. The gravel was supplied to the job as directed by the inspector who was the representative of the engineer. Accordingly when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. The appellant has concurred in the position taken by the engineer and has maintained this position down to the present, thus bringing itself within the principle of the decision in *Panamena* v. *Leyland* (1). In that case, when the surveyor insisted on matters outside the quality and quantity of the work, which alone he was by the terms of the contract authorized to take into consideration, and this was concurred in by the appellant, the respondent was absolved from the requirement with respect to a final certificate. The same applies in the case at bar.

By the terms of the contract the respondents covenated to

> Do the whole of the works herein mentioned with due expedition and in a thoroughly workmanlike manner, in strict accordance with the provisions of this Agreement, and the said Plans, Specifications and General Conditions therein referred to . . .

The appellant on its part covenanted with the respondents:

> That if the said work including all extras in connection therewith, shall be duly and properly executed as aforesaid, and if the said Contractors shall observe and keep all the provisos, terms and conditions of this Contract, they, the said City, will pay the said Contractors therefor the sum of $112,282.32 (more or less) according to the schedule of unit prices in the Form of Tender, upon Estimates or Certificates signed by the Engineer.
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> Provided that no money shall become due or be payable under this Contract unless and until an Estimate or Certificate therefor shall have been signed by the Engineer as herein provided the possession of which is hereby made a condition precedent to the Contractors' right to be paid or to maintain any action for such money or for any part thereof.
>
> Provided also that the said City shall not be liable to pay for work rejected or condemned by the said Engineer, or to pay any money upon any Estimate or Certificate until the work so rejected or condemned has been replaced by new material and workmanship to the written satisfaction of the said Engineer . . .

(1) [1947] A.C. 428.

It cannot, in my opinion, be doubted that the "Estimate or Certificate", the possession of which is made a condition precedent to payment, is one covering the work as to quality and quantity at the appropriate rate called for according to the prices stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no more essential to the respondent's right of action than it would have been in *Panamena's* case had the surveyor in that case, issued his certificate for a reduced amount by reason of his view of the economical manner in which performance of the work had been carried out, a matter entirely outside the scope of his authority to consider.

The lack of an order in writing for the quantity of gravel in excess of the estimate of 2600 tons is not an obstacle in the way of the respondent, and, as already pointed out, Mr. Robinette does not rely upon this point. That estimate was for the 6" gravel course only and did not include the gravel used in filling the soft spots. It has not been shown what the respective amounts required for the gravel course and the soft spots respectively, were, and therefore it is not shown that the 2600 tons for the gravel course was exceeded. It was, no doubt, for this reason that Mr. Robinette took the position he did on this point.

With respect to the asphalt, the relevant provisions of the original contract, as amended by the later contract, as well as the specifications, are as follows. The original "Information to Bidders", after providing for the removal of the existing pavement and sub-structure, went on to state:

> It is then proposed to fill the space formerly occupied by the ties with compacted asphaltic concrete base course, and also to build up the shoulders of the present concrete base with the same material, after which it is proposed to spread the consolidated asphaltic concrete wearing surface, *varying the thickness from 1" to 2"*. In making this consolidation of the asphaltic concrete wearing surface, it is proposed that the engineer should set grades at intervals not exceeding 50 feet, which will effect a parabolic cross sectional contour on the finished pavement.
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> Attention is drawn to the fact that this *contour must be carefully followed,* in order to strengthen the bearing value of the pavement, and in order to *partially eliminate the excessive crown* which is apparent on the existing street.

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Item 327 of the original specification has the following:

The surface course shall consist of coarse aggregate sand and mineral filler uniformly mixed with asphalt cement and shall be laid upon the previously prepared pavement base to a minimum thickness of one inch and a maximum finished depth of two inches, as directed by the Engineer.

Clause G. of the General Conditions provides that no work shall be done without lines, levels, and instructions having been given by the engineer, "or without the supervision of an inspector." It is provided by the specification, under the heading "Method of Payment", that:

All hot-mix, hot-laid asphalt mixtures supplied and incorporated into the work will be paid for at the price tendered per ton.

The Owner will provide and place a man at the Contractor's weigh scale for the purpose of weighing the mixtures incorporated into the work, and the net weights so determined will be the only basis for payment.

The specification under the amending contract under the heading "Scope of Work" provides:

Remove existing concrete base.

Excavate the material thereunder to a depth to provide a 6″ crushed gravel base course and new concrete sub-base 8″ thick and a minimum of 3″ binder and asphaltic top.

Provide 6″ crushed gravel base course and 8″ concrete base and minimum of 2″ of asphaltic binder and 1″ of asphaltic top.

The engineer interpreted, for purposes of his final certificate, the later specification as to the wearing surface, as providing for a thickness of 1 inch only. In his view, "minimum" in the second paragraph of the amending specification under the heading "Scope of Work" above, was confined to the 2 inches of asphaltic binder and did not apply to the 1 inch of asphaltic top. He therefore entirely disregarded the actual quantity of asphalt delivered and arrived at a theoretical figure by taking the superficial area on the footing of 1 inch in depth and ascertaining the weight by that means.

It has been expressly found in the courts below, that in executing the work after the amending contract was entered into, the respondent continued the practice it had previously followed and laid a minimum thickness of 1 inch and a maximum thickness of 2 inches, under the specific instructions of the inspector on the job. Both the respondent and the inspector considered that in so doing they were

carrying out the terms of paragraph G. of the General Conditions of Contract. No one suggested that there was any ambiguity in the terms of the contract in this respect until the completion of the work when the engineer, Meadows, did so, as above mentioned. When the question of a final certificate came up Meadows had himself up to that time, issued progress certificates for asphalt on the basis of tonnage actually delivered, and the respondent had received payment.

The appellant again places reliance upon clause F. of the General Conditions already quoted above and contends that Meadow's decision as embodied in his final certificate, governs.

In the language of Roach J.A. the answer is:

> That *during the progress of the work* there was no dispute between the plaintiff and Meadows as to the thickness of the asphaltic wearing-surface called for by the plans and specifications. The plaintiff's interpretation of the plans and specifications as they related to that item differed from the interpretation Meadows now says he intended they should bear, but the parties were not disputing about it. The plaintiff did not know that there was any difference between their respective interpretations.

Roach J.A. also says:

> Meadows saw the plaintiff proceeding with the work in compliance with the understanding of its superintendent, but never communicated any objection to the plaintiff. At the trial Meadows stated that on one occasion he objected and in substance warned the superintendent against laying down a greater thickness than 1 inch of asphaltic wearing-surface. The superintendent in his evidence denied any such discussion and the trial judge accepted the superintendent's evidence.
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> Meadows must have known that the plaintiff, in laying down a thickness of asphaltic top in excess of 1 inch, was doing so because its superintendent interpreted the plans and specifications as permitting it and requiring it where to do so was necessary for proper drainage. If he felt—and he now says he did—that the plaintiff was thereby exceeding the thickness authorized, he should have interfered at the time. To stand by and do nothing about it was to acquiesce. Even more important than the foregoing is the fact that Courtlee specifically instructed the superintendent to proceed as he did. To my mind it is idle to say that Courtlee thereby exceeded his jurisdiction. He was on the job to see that the work, as it progressed, had that standard of excellence agreed upon between the parties. He gave those instructions, not for the purpose of varying the plans and specifications, but for the purpose of requiring the contractor to live up to them.

In my opinion the engineer has in this instance also, abdicated his function under the contract. The asphalt, like the gravel, was to be paid for by weight. This was the

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"only basis of payment" provided for by the contract. The same principle, therefore, applies as in the case of the gravel save as to the excess over the estimate of 3000 tons as to which the lack of an order in writing is, in my opinion, fatal.

Accordingly the appeal should be dismissed with costs but the judgment should be varied by deducting $1,305.02, the value of 160.125 tons of asphalt which is the amount in excess of the estimate. In the circumstances, this variation should not affect the costs.

Appeal dismissed with costs and judgment of the Court of Appeal affirmed subject to a variation.

Solicitors for the appellant: *Creighton, Fraser, Drynan & Murdoch.*

Solicitors for the respondent: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

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*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Cartwright JJ.