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*Mar. 18, 21, 22 June 24

DRYDEN CONSTRUCTION COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Road construction—Time of the essence—Contractor unable to complete work in time—Work completed by principal—Claim for deficiencies in payments—Claim for compensation—Quantum meruit.

The plaintiff company undertook to construct a road for the defendant. Time was stated to be of the essence. Slow progress was made by the plaintiff with the work, and in order to complete the work on time, the road was shortened and also built to grades lower than originally agreed upon. Eventually, the plaintiff ceased all work under the contract, and contending that the defendant was in default under the contract in refusing to entertain a claim for substantial deficiencies in payments due, treated the contract as terminated by the defendant. The plaintiff claimed the deficiencies and the defendant claimed compensation for breach of the contract. The trial judge maintained the action, but this judgment was reversed by the Court of Appeal.

Held: The appeal should be dismissed.

The terms of the written contract applied throughout to the work performed by the plaintiff. Conclusive evidence proved that the plaintiff had not completed the work to the satisfaction of the engineer by the time it abandoned the work, nor was it shown that it had been released of its obligation to complete the whole length of the road. The alleged breach of contract by the defendant was not established. The plaintiff was not entitled to *quantum meruit* but only to contract unit prices; and the defendant was entitled to damages for breach of contract by virtue of the plaintiff's refusal to complete the work.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wells J. Appeal dismissed.

A. L. Flemming, Q.C., and *Meredith Flemming, Q.C.*, for the plaintiff, appellant.

R. F. Wilson, Q.C., R. L. McDonald, Q.C., and *C. E. Woollcombe*, for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] by which the appeal of the present respondent from the judgment of Wells J. was allowed, the judgment at the trial set aside and the cross-appeal of the present appellant dismissed.

On April 9, 1954, the appellant, therein described as the contractor, and the respondent entered into an agreement for the construction of approximately $8\frac{1}{2}$ miles of a road from a designated point on Provincial Highway no. 105 westerly to Station 450 of the said road. The respondent was at the time in the course of constructing an electric generating station at Manitou Falls on the English River, and the proposed road was to provide access to this undertaking.

[1] [1958] O.W.N. 349, 14 D.L.R. (2d) 702.

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Prior to the making of the contract the appellant had been invited to tender for the work and had been furnished with a form of the contract which would be made if the tender made was accepted, the general specifications which would be applicable, drawings which indicated the location and a profile of the proposed road, and further detailed information as to the proposed work.

In view of the contention of the contractor that the nature of the location for the proposed road had been misrepresented to it, certain of the terms of the tender that was made dated February 13, 1954, and which was accepted are to be considered.

The tender recited that the appellant had visited the location of the road, examined the documents above referred to, and was fully informed as to the nature of the work and the conditions relating to its performance and understood that the quantities tendered for were approximate only and subject to either increase or decrease.

The instructions to the tenderers which were in the appellant's possession before the tenders were made contained the information that tenderers were required to examine the conditions at the site before submitting their tender and that the road was urgently required and the completion date should be September 1, 1954.

The documents described as instructions to tenderers, information for tenderers, which contained the above mentioned statements, the general specifications with accompanying drawings and the standard specifications of the respondent as enumerated in the agreement, were by their terms to be read with and form part of the contract.

By para. 6 of the contract the contractor agreed to construct the road on or before September 1, 1954, in strict accordance with the contract and to the approval of the engineer, and to do all work under the direction of the engineer whose directions as to the construction and meaning of the exhibits were declared to be final.

The respondent agreed to determine the contract price for the work on the basis of the schedule of unit prices, which were those proposed by the appellant in its tender, applied to the quantities of the several works items actually performed, as computed by the engineer, in accordance with the drawings and specifications.

In dealing with the main claim of the appellant, the prices which apply are those for earth excavation (including borrow) of .50 cts. per cubic yard and rock excavation of $1.75 per cubic yard.

Para. 8 of the contract stated that the contractor agreed that it was fully informed regarding all of the conditions affecting work to be done and labour and materials to be furnished for the completion of the work, that this information was secured by personal investigation and research and not from the commission or its estimates, and that it will make no claim against the commission based on any estimate or representation of the commission or the engineer, or any representative of either.

Para. 11 reads:

> The Commission, without invalidating the Contract, may make changes by altering, adding to or deducting from the work subject to adjustments for compensation or extension of time as may be agreed between the parties hereto.

Para. 13 obligated the contractor to prosecute the work with all skill and diligence so as to complete the same in accordance with the contract and declared that if the contractor did not, in the opinion of the engineer, carry on the work with sufficient diligence and speed to ensure completion in accordance with the contract, the commission might terminate the agreement and at its option complete the work in such manner as it should think fit, the contractor to be liable for any loss sustained by the commission by reason of the contractor's failure to complete the work.

Para. 16 provided that any loss or damage arising out of the nature of the work, or from any unforeseen circumstances in the prosecution of the work or any unusual obstructions or difficulties, should be sustained and borne by the contractor at his own cost.

Para. 21 provided that the decision of the engineer should control as to the interpretation of the drawings and specifications during the execution of the work and that he should be the sole judge of the work, material and plant, both as to quality and quantity, and that his decision on all questions of dispute relating to any of these matters should be final.

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The general specifications forming part of the contract provided that payment for compaction should be included in the tendered unit price for earth excavation.

The standard specifications for general grading operations made applicable to the contract provided by para. 18 that "earth excavation shall include the removal of all material that does not come under the classification of rock." Para. 21 provided, *inter alia,* that back-fill material, if specified, should be paid for at the contract unit price for the material used. Para. 28 provided that all rock excavated should be used for rock embankment construction and material from earth cuts or earth borrow should be used for earth embankment, if approved by the engineer. Para. 43 provided in part:

> Payment for earth and rock embankment construction shall be included in the contract unit prices per cubic yard for excavation. . . In addition, payment will be made for:
>
> (*c*) Borrow material at the contract unit price per cubic yard for earth or rock excavation for the material actually used in embankments.

The cross section of the proposed road shown upon the plan submitted to the contractor showed that it was to be constructed of what may properly be described as three courses, the lower course being described in the cross section as being of earth or rock-fill. Above this, there was to be placed 12 inches of selected granular base B material and, above that, 6 inches of 5/8 inch crushed gravel. The top course was to be given what was described as Bituminous Surface Treatment, in accordance with designated specifications. The granular base course was defined in the standard specification as being selected from deposits of pit-run gravel, sand or other granular materials which have a physical structure not affected by water and elements, and the Class B mentioned, it was said, might be used directly from the pit without processing if the material conformed with the specification requirements which were then stated in para. 7.

Included in the information supplied to the tenderers was a statement that an extensive body of material suitable for road construction had been located by the commission near the junction of the proposed access road and the

provincial highway and that no other areas in the vicinity of this section of the road had been investigated up to the time the information was furnished.

The appellant's tender was made during the winter, at a time when the area in which the proposed road was to be constructed was covered with snow. While the profile plan which was exhibited to the appellant indicated the nature of the ground at various places along the course of the proposed road, this was information which the commission had obtained by enquiry and was not, by the terms of the tender and the contract, guaranteed to be accurate. In the result, not long after the appellant commenced its work, it was found that this information was in many respects quite inaccurate. There was, however, close to the point of the commencement of the road, the large deposite of suitable granular material referred to, from which the great majority of the material of this nature used in the construction of the road throughout its course was obtained. The evidence appears to me to justify the conclusion that, in the main, the material from this source was suitable for the selected granular base course required by the contract and the specification.

The form of tender supplied by the commission for use by proposed tenderers also contained estimates of, *inter alia,* the quantities of the various kinds of material to be excavated, the estimated extent of the muskeg excavation being 8,000 cubic yards. These estimates, which were described as such, turned out to be quite inaccurate and a very much greater quantity of material was excavated from muskegs than the estimate indicated.

By the terms of the contract the appellant agreed to construct the road westerly to Station 450 of the said road. Its course was shown upon a drawing which was made part of the contract. The profile plan referred to in the tender showed the proposed levels of the road and the location of these stations, they being 100 feet apart. Whether their location was marked on the ground along the proposed right-of-way is not stated.

Donald Murphy, the president of the appellant company, was in active charge and direction of the work from the outset. For the respondent, P. G. Campbell, the resident engineer for the construction work at Manitou Falls, was

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appointed the project manager in connection with the construction of the road. W. G. Baggs, a professional engineer employed by the respondent, was appointed as the divisional engineer in charge of the construction and was in constant touch with the work throughout.

According to Murphy, when the work had progressed to a point between Stations 25 and 35, it was necessary to excavate and back-fill a considerable area of muskeg and, upon the direction of Baggs, granular material brought from the borrow pit above mentioned was used for this purpose. It was Murphy's contention, advanced at this time and never abandoned by him, that under the terms of the contract the appellant was entitled to be paid for granular material used, either as back-fill, embankment or otherwise, in connection with the work, at the price stipulated in the agreement for the selected granular base course which was .68 cts. per ton, or approximately $1.02 per cubic yard. Baggs, on the other hand, said that the only material that would be paid for at this rate was that used for the course 12 inches in depth described as selected granular course in the plan and the agreement, and that all other granular material used would be paid for only as earth excavation for which the price of .50 cts. per cubic yard was payable.

The claim advanced by Murphy on behalf of the appellant was based upon a term of para. 21 of the standard specification which said:

> Back-fill material if specified will be paid for at the contract unit price for the material used.

Since the engineer directed that granular material should be used, it was contended that the price for that material agreed upon for the selected granular base course was applicable. This contention was made on behalf of the appellant at the trial and in the Court of Appeal and, in both Courts, it was found that as there was no contract unit for granular material or gravel as such, apart from the 12 inches of selected granular base course, when used elsewhere it must be deemed to come under the heading of earth excavation, payment for which was provided for in para. 7 of the contract. By the terms of para. 43 of the specification above mentioned this payment included placing the material as part of the road construction.

By a tender in writing dated June 7, 1954, the appellant offered to supply 14,000 tons of $\frac{5}{8}$ inch crushed gravel to be delivered to a 4.8 mile stretch of the road, and 4,000 tons to be stock-piled at the gravel pit area "G" which was close to the point where the road commenced, at prices which were stated. This offer was accepted in writing by the respondent on July 20, 1954, and this material which was required for the top course of the road was laid by the appellant up to Station 95.

Slow progress was made by the contractor with the work. This was undoubtedly due in part to the fact that the terrain encountered was less favourable for road construction than Murphy had anticipated and to bad weather. By July 21st, when they were working at about Station 95, less than 2 miles from the point of commencement, Campbell wrote to Murphy pointing out that the agreement required the work to be completed by September 1, 1954, that he had repeatedly drawn to the contractor's attention that it was behind schedule and that when asked how it was proposed to improve the speed of the work no satisfactory answer had been given. The letter stated that the project manager had recommended to his superiors that the commission itself take over the completion of the last $1\frac{1}{2}$ miles of the road and carry out the work by its construction department. Apparently, Murphy raised no objection to this.

At a meeting at Dryden, held on or about July 22nd, Campbell informed Murphy that he proposed to reduce the grade of the road and gave him a written memorandum as to the changes to be made between Stations 103 and 145. The purpose of this, according to Campbell, was to reduce the quantities of materials to be moved so that the work might be completed on time. Apparently, an extension of time for completing the work was discussed at this meeting as on the same date Murphy wrote to Campbell confirming a discussion of the subject and saying that it was expected to have the road completed by September 15 to the full width but not to the profile grade. Murphy did not object to the commission taking over the part of road indicated and the work continued.

According to Murphy, he was instructed by Baggs not to put any more of the $\frac{5}{8}$ inch crushed material on the road past Station 95. He was indefinite as to the date when this

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occurred, saying that it was either in the first or second week of August. Campbell denied that any such instructions were given. Baggs was not asked as to this but a letter written by him to D. Ganton, the superintendent of the appellant company, on August 9, 1954, in which he drew the superintendent's attention to various matters connected with the work which he considered required attention, was put in evidence and included the following statement:

> Before placing $\frac{5}{8}$ inch crushed gravel between Sta. 95 plus 00 and Sta. 145 plus 00 the road surface is to be brought to final grade as indicated on my Memo to you re "List of grades to be adhered to and considered as profile grade".

The list of grades referred to were those shown in the memorandum which had been given to Murphy on July 22nd. Murphy acknowledged having seen this letter at the time and the instructions appear to be completely inconsistent with his statement that work of laying this material had been stopped.

As the progress made with the work continued to be unsatisfactory and as Murphy contended that the work already done had not been paid for in accordance with the agreement, a meeting was arranged between him and some of the senior officials of the commission and one of its solicitors in Toronto early in August. Murphy was represented by a solicitor at these meetings but there is a conflict of evidence as to what was actually agreed upon. It is, however, common ground that the parties agreed that the commission should take over the $1\frac{1}{2}$ miles of the road above mentioned and the appellant be released of any obligation as to that portion of the work and that the time of completion be extended to September 15th.

The work which had commenced in April had then been in the main completed to Station 185, though the top course of $\frac{5}{8}$ inch crushed gravel had not been laid past Station 95, and an equal distance of the road remained to be completed. In view of the urgency of having a usable road for hauling freight by September 15th, further changes in the work were then directed by Campbell. On August 17, he wrote to Murphy in the following terms:

> In view of the importance of having a road through to the powersite by September 15th, we have requested you to concentrate on placing fill, only to a depth required to carry your haulage equipment; thus providing us with a road bed of reasonable grades, over which we can haul freight.

Since this material will be placed as common fill and will in most cases be of sufficient depth to meet our requirements for a finished road bed, some method of paying you for the top 12 inches of this fill, as selected granular base course, will have to be agreed upon.

We are prepared to pay you for a volume of selected granular base course 12 inches thick and 29½ feet wide over the total length of the road from Sta. 0 plus 00 to 370 plus 00. This volume to be converted to a weight basis by applying a factor of 3,600 pounds per cubic yard of material compacted in the road bed.

Please study this proposal and advise if you are in agreement with this method of determining the quantity of material to be paid for as selected granular base course.

Further instructions as to this work were given by Baggs in a letter to the superintendent of the appellant which read in part:

It is requested that your company concentrate on placing fill only to a depth required to carry your haulage equipment. From Sta. 193 plus 00 to 370 plus 00, except for several muskeg and rock excavations, the road is strictly a fill proposition, and grades should be kept to at least sub-grade, and where possible, lower. In order to do this, it will be necessary that the road bed, before fill is placed, be well drained, and in a reasonably dry condition. This can only be made possible by paying particular attention to lateral and offtake ditches.

This letter was dated August 20, 1954.

No written reply was made to either of these letters. The appellant, however, proceeded with the work, using granular material where fill was required for the lower course and, the appellant contends, placed the 12 inch granular base course to Station 370. This road which was referred to by the parties as a "skin" road from Station 185 was lower than the grade shown upon the profile, this being accomplished by lowering the lower course required by the original contract. This portion of the road as constructed was apparently sufficient to carry the trucks which brought the material for the construction.

In spite of this change which very materially reduced the amount of work to be done by the contractor, Station 370 was not reached until about September 22nd.

Murphy then took the attitude for the first time that the work to be performed by the appellant had been completed. On September 28, 1954, the appellant wrote to Campbell saying that since the base road was completed the appellant would no longer require the services of a machine which it had rented from the commission.

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The reasons assigned by the appellant for declining to carry out the terms of the written agreement must be carefully considered. On September 11, 1954, Murphy had written to the general manager of the respondent stating that the monthly estimates made on the instruction of the respondent's engineer upon which payments were made differed so materially from the work actually done that the appellant found its credit jeopardized and unless the matter was remedied the appellant would be unable to continue. There was enclosed with this letter a statement purporting to show the difference between the various materials actually placed in the road according to the appellant's figures, and those allowed by the engineer for the months May to August inclusive. According to this statement, while payment had been made by the respondent for 16,180 tons of granular material in June, the appellant had placed 52,430 tons on the road and in the other months very large discrepancies were shown. As to the granular material, it is admittedly the fact that in preparing these figures all granular material placed upon the road, whether or not it formed part of the granular base course, was treated as material for which the appellant was entitled under the contract to payment at the rate of $1.02 per ton instead of .50cts., as contended by the engineers. This contention was based upon an interpretation of the contract which the learned trial judge and the Court of Appeal have held to be erroneous.

On October 1, 1954, Murphy wrote to J. R. Montague, the director of engineering of the respondent at Toronto, in response to a request that he state what were the appellant's claims. In this letter it was stated that the appellant's contension was that all quantities of granular material used as backfill sections over critical material (meaning material unsuitable for use as fill), all through cuts of critical material, all back-fill of muskeg excavation and all fill through wet sections must be classified as granular base course and paid for at the contract unit price for such material.

On October 7, 1954, J. H. Amys, Q.C., who had attended the meeting with the Hydro Commission above mentioned as solicitor for the appellant, wrote to the respondent saying that Campbell had declined to have the quantities of

selected granular base course material calculated in accordance with an agreement that he had made with Murphy and that the appellant took the attitude that the commission had defaulted in its obligations under the contract and that such default justified it in treating the contract as terminated by the Hydro-Electric Power Commission of Ontario. The reference to the agreement said to have been made between Campbell and Murphy as to the measurements of granular material was one which they had agreed upon early in the work but which Campbell had thereafter decided was unsuitable as a means of accurately determining the quantities and declined to carry into effect.

On the day following, a letter was sent to the respondent in the name of the appellant company saying that, as the commission had refused to entertain its claim for substantial discrepancies due under the contract which, it was said, amounted as of September 30th to approximately $100,000, the appellant treated the contract as terminated by the commission and that such termination justified the appellant in ceasing further work under the contract. The contract referred to at the end of this letter was described as being Manitou Falls Generating Station Access Road Construction Contract. The only contract that answered that description was that of April 9, 1954.

The cause of action set up in the statement of claim was that in the course of attempting to carry out the contract of April 9, 1954, the parties had found that the drawings did not describe the road required by the defendant for the purposes of its enterprise, that the plaintiff had been verbally requested by the defendant to construct a shorter road at the general location indicated in the written contract, but in conformity with the actual conditions found on the terrain rather than with those shown on the drawings, and that payments were to be made as the work progressed and that it was an implied term that the plaintiff would be paid a reasonable price for its materials and labour. It was further alleged that:

> The plaintiff proceeded with the said work which the defendant accepted but the defendant did not carry out its undertaking to make payments as the work progressed and as a result the plaintiff was obliged to stop work on the road.

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In respect of the cause of action thus pleaded the defendant claimed the sum of $457,245.14 for breach "of contract on building the road", or alternatively on a *quantum meruit* basis.

In response to a demand for particulars the plaintiff said that the request to construct a shorter road had been made by Campbell on or about July 21, 1954. As to the allegation that the defendant had accepted the road, the plaintiff said that the defendant had taken over and used the work done by the plaintiff in the Fall of 1954, thereby accepting it.

The defence denied that the plaintiff had been requested to construct a shorter road and set up the terms of the contract and the documents incorporated in it as an answer to the claim. It was further denied that the defendant had accepted the road and alleged that as the plaintiff had failed to carry out the work required the defendant had been compelled to complete such work at an expense of $17,925.07. This amount, while claimed originally as a counterclaim, was later added to the statement of defence by way of set off.

The learned trial judge found, as has been stated, that for the granular material used in the construction of the road other than for the granular base course 12 inches in depth, the appellant was entitled to be paid .50 cts. per cubic yard, being the price specified in the contract for earth excavation. The claim pleaded that a new contract had been substituted for that of April 9, 1954, was rejected and the plaintiff was found entitled to recover for the work performed up to Station 186 in accordance with the prices fixed by the written contract. Wells J. however, considered that the situation was different in respect to the work done from Station 186 to Station 370. Referring to the letter of August 17, 1954, above quoted, the learned judge found that the directions there given did not amount to an abandonment of the contract but that the effect of it was to take away from the contractor for the remaining portion of the road what were referred to as the two most valuable items of the contract, namely, the laying of the $\frac{5}{8}$ inch crushed gravel and the laying of the selected granular base course from Station 186. Pointing out that while paragraph 11 of the contract permitted the respondent to make changes by altering, adding to or deducting from the work,

the right was "subject to adjustments for compensation or extension of time as may be agreed between the parties hereto", and it was said that this implied that proper compensation should be made and that no such adjustments were ever made. The reasons continue:

> The failure to make such compensation was, in my view, a serious breach of the contract by the defendant Commission, and, in view of such breach and failure, the plaintiff was, in my view, entitled to stop work as he did. He would have, I think, been entitled to do it earlier.

In these circumstances the learned judge considered that the amount of the compensation should be calculated and that this could be done only by requiring the defendant to pay for what had been done as on a *quantum meruit*. It was further held that there was not any "clear understanding with Mr. Murphy, and I accept his evidence and that of his witnesses that so far as they understood their work was through when the skin road was put through and the road finally trimmed and cleaned up." It was, accordingly, not necessary to consider the claim of the present respondent to set off against any moneys owing to the appellant its costs of completing the road in accordance with the written contract.

The trial judge further allowed the plaintiff company to amend by claiming a number of sums as extras to which I will make reference later.

The unanimous judgment of the Court of Appeal was given by Laidlaw J.A. It was found that the terms of payment prescribed by the written contract applied throughout and directed that the judgment at the trial be set aside. Upon the vital question as to the basis upon which the appellant was entitled to payment for granular material used other than for the 12 inch granular base course, in agreement with the trial judge, it was held that the price applicable was .50 cts. per cubic yard under the terms of the contract and that the changes made, first at Station 95 and thereafter at Station 186, did not make the work of construction radically different from that which was undertaken by the appellant under the contract. After pointing out that the reduction in grade was made by reducing the dept of the earth and rock-fill only and that the necessity for this reduction was occasioned by the urgent need of the

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respondent to have the whole length of the road in a usable state by September 15th as agreed, the learned judge said that the reductions thus made were an accommodation to and for the advantage of the appellant since, in the event of non-completion of the road on or before September 15th, the respondent might have exercised its contractual right to declare the contract forfeited and have proceeded to hold the appellant liable in damages for breach of contract. Upon the evidence the learned judge concluded that the appellant knew that, after placing the earth and rock-fill and building the base course overlying it from Station 186 to Station 370, the respondent expected that at a later date the surface course of $\frac{5}{8}$ inch crushed stone would be laid by the appellant in accordance with the contract and that both parties fully understood that the contract continued in force and effect notwithstanding the reduction in the grade.

For the reasons given in the judgment at the trial and in the Courth of Appeal, I agree that under the terms of the contract the granular material used, other than for the base granular course, was to be paid for at the rate fixed for earth excavation, including "borrow", that is .50 cts. per cubic yard. The pit run gravel that was used was borrow material. I also agree with the learned judges of the Court of Appeal that the terms of the written contract applied throughout to the work performed by the appellant.

The contract made between the parties dated April 9, 1954, was executed under their respective corporate seals. The contractor, as I have pointed out, agreed to construct a road in accordance with the specifications and that all phases of the work should be performed to the satisfaction of the engineer on or before September 1, 1954. Time was declared to be material and of the essence of the contract.

In order to succeed it was necessary for the appellant to establish that in some manner it had been released of its obligation to complete the road throughout its length, including the construction of the lower course and the granular base course from Station 186 to Station 370, and the laying of the top course and the application of the bituminous surface treatment from Station 95 to the end of the road, to the satisfaction of the engineer. That the appellant had not completed this work to the satisfaction of the engineer on October 8, 1954, when it abandoned the work, is conclusively proven by the evidence.

With great respect I disagree with the finding at the trial that the respondent was then in default under the contract and that the appellant was entitled to elect to treat such contract as repudiated by the respondent.

I find nothing in the evidence to support a contention that the appellant was released of its said obligation under this contract. The letters referred to directing the work to be done forthwith between Stations 186 and 370 did not say that the contractor was relieved of its obligation to lay the top course upon the road from Station 95 to Station 370 and to apply the bituminous surface treatment, or that the work was not to be carried out to the satisfaction of the engineer. The reason for the orders then given by the engineer are made apparent by the evidence. The road was urgently needed by September 15th for transporting freight to the large construction works being carried on at Manitou Falls and less than one month of the new time stipulated for completion remained and half of the road remained to be constructed. At that time the appellant had spent four months upon the first half of the road and even that work was not completed.

The learned trial judge, after considering the evidence, found that when these instructions were given to Murphy it was not made clear to him that he was to do anything more than comply with the directions then given. I would not so interpret the evidence but, even if this were correct, it does not assist the position of the appellant. The written contract still remained in force, the grade between Stations 186 and 370 had not been completed to the satisfaction of the engineer and the top course had not been laid past Station 95. It was not necessary for the engineer to point out to the appellant or its officers its obligations under the contract.

This covenant of the appellant remaining unfulfilled, the respondent was entitled to insist upon its performance unless in some manner it was estopped by the actions of the engineer from doing so. As to this there is no plea of estoppel in the appellant's pleadings and estoppel must be pleaded. I may add that if there were such a plea, any such contention, in my opinion, is untenable upon this evidence.

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I have carefully examined the evidence of the witnesses Murphy, Campbell and Baggs and the correspondence affecting the matter and, having done so, I share the view expressed by Laidlaw J.A. that both parties understood that the written contract continued in force throughout and that Murphy knew that, after completing what has been referred to as the skin road, the engineer expected that the remainder of the work would be completed forthwith. There is evidence in the record of a discussion in the cookhouse of the appellant company on September 21, 1954, between Murphy and C. T. Enright, the roads supervisor of the respondent commission, at which time Enright says that Murphy stated that he would keep his entire crew working full time until he had got the skin road through to Station 370, at which time he would give his men a holiday of four days and then he would come back and finish up the road, but that one of the conditions for coming back was that he would get "a revision of prices on certain materials." Baggs was present and heard this statement by Murphy and gave evidence to the same effect. The latter, when asked about it, admitted that he had been there and talked to Enright but said that he did not remember saying that they would not do any further work unless they were paid. The judgment at the trial, dealing with this conversation, says that Murphy denied this but this, with respect, was inaccurate since he merely said that he did not remember making the statement. While referring to the fact that Baggs had given evidence to this effect, no mention was made of the fact that Enright also had sworn to it. The statement in the letter of October 8, 1954, above referred to, that the appellant was justified in "ceasing *further* work under the contract", is completely inconsistent with the idea that at that time Murphy considered the work to be done had been completed.

It will be seen that the reason assigned by the appellant for treating the contract as repudiated by the respondent and itself discharged from doing further work was not the reason upon which that action was justified in the judgment at the trial. The letter of September 11, 1954 complained that the monthly payments that were being made were not in accordance with the contract, the complaint being based upon the respondent's refusal to pay for the granular

material in accordance with Murphy's construction of the agreement. The letter of October 1st from Murphy to the director of engineering of the respondent made it perfectly clear that this was the complaint and the letters of October 7th and 8th based the appellant's refusal to do further work on the alleged fact that approximately $100,000 was owing to the appellant for the work already done, this referring to the same matter.

These letters contain no complaint that the effect of the instructions given by the engineers in August was to deprive the contractor of the profitable work of laying the granular base course and the top course of the road. There was good reason for this since this work had not been taken away from the appellant, though the time for completing it was deferred. As the evidence discloses, the appellant repudiated the contract upon grounds which have been held to be and are untenable and the usual consequences must follow.

Apart from the claims made in respect of the construction of the road, the appellant claimed an amount for supplying certain 5/8 inch crushed gravel under the terms of the contract of July 20, 1954. That contract fixed a price for 14,000 tons of this material to be delivered to a 4.8 mile stretch of the road at $1.78 per ton, and 4,000 tons to be stock piled at a specified gravel pit for which the price was .97 cts. per ton.

In addition, the appellant claimed to recover under a further contract dated July 31, 1954 for 2,938 tons of crushed gravel concrete aggregate and 8,582 tons of concrete sand which it claimed to have delivered. The statement of defence denies that the appellant had delivered any of the 5/8 inch crushed gravel under the contract of July 20, but admitted that the plaintiff had delivered material under the contract of July 31 to a total slightly in excess of that claimed, in respect of which it was admitted that the appellant was entitled to a credit of $9,247.39.

The price provided for the 5/8 inch crushed gravel, other than that which was to be stock piled, included the delivery of this material on to the road and this had not been done, the appellant contending that it had been stopped from doing so. This fact was found against it in the judgment at the trial.

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DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

In dealing with this claim, Wells J. directed that there be a reference to the Master to determine the amount payable in respect of the 5/8 inch crushed gravel less a fair and reasonable amount to be deducted from the contract price for the haulage of such part of the said material as should have been delivered by the plaintiff. In respect of the claim for the material produced under the contract of July 31st, the Master was directed to give credit to the plaintiff in the amount of $9,192.04, a sum less than the amount admitted as payable in the statement of defence.

The judgment of the Court of Appeal, as entered, directed the Master to enquire as to the amount of the credit to be allowed for the 5/8 inch crushed gravel referred to, being the cost to the plaintiff of producing such material, plus a reasonable percentage of such cost as profit. No mention was made of the credit to be allowed in respect of the material covered by the contract of July 31.

No objection was made to the form of this reference to the Master and, as the amount of the credit to which the appellant is admittedly entitled on the pleadings is not in question and will be taken into account by the Master, I think it unnecessary to amend the judgment of the Court of Appeal in this respect.

In addition to these claims, the appellant was permitted by the judgment at the trial to claim various amounts as extras and the pleadings were amended to claim certain sums should it be held that the appellant was not entitled to be paid as on the basis of a *quantum meruit* for its entire claim.

As to all of these claims I agree with the reasons for judgment of Mr. Justice Laidlaw and am of the opinion that they are properly dealt with in the judgment of the Court of Appeal.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Flemming, Smoke & Burgess, Toronto.

Solicitors for the defendant, respondent: Day, Wilson, Kelly, Martin & Campbell, Toronto.