1960

*Jun. 2, 3
Jun. 24

CHARLES GARCEAU .....APPELLANT;

AND

MAURICE R. OUELLETTE .....RESPONDENT;

AND

LOUIS H. SIDELEAU .....MIS-EN-CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

*Contracts—Building contract—Extension to building—Final cost—Whether contract at fixed price—Whether settlement of all claims—Action to enforce builder's privilege—Civil Code, art. 1690.*

By a contract between the appellant and L, the latter undertook to build an extension or addition to the hotel owned by the appellant. L was furnished with a sketch and rough plan and specification. The contract stipulated the payment of $16,000 in instalments. L was to be paid 10 percent as his fee, but agreed, in the event that the contract was to run in excess of the $16,000, to waive this percentage charge on the excess, on condition that the appellant pay the installments as before. The eventual cost far exceeded the amount of $16,000. The appellant paid the contract price and give two promissory notes to L for $3,000 each, paying both at maturity. He refused to pay the excess, and took the position that the contract was a contract at a fixed price within art. 1690 of the *Civil Code*, and furthermore that L had accepted the second promissory note in full and final settlement of all his claims.

The respondent, as trustee of the estate of L, a bankrupt, took an action to enforce a builder's privilege. The appellant took an action to have the registration of such privilege declared null and void. The respondent's action was allowed and the appellant's dismissed by the trial judge. These judgments were reversed by the Court of Appeal.

*Held:* Both appeals should be dismissed.

There was no evidence to support the contention that the second note was accepted by L in final settlement of all his claims. Moreover, no fee for L's services was included in the total payments made by the appellant.

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

The sketch and plan furnished by the appellant could do no more than give a general idea of the extent and character of the work to be done, and it was obvious that the parties had contemplated that there would be changes and alterations and that the estimated cost would be exceeded. The contract was not undertaken at a fixed price and art. 1690 had therefore no application.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing two judgments of Cliche J. Appeals dismissed.

*R. Bouchard, Q.C.*, and *G. Normandin, Q.C.*, for the appellant.

*A. Forget*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—These appeals are from judgments of the Court of Queen's Bench[1], unanimously reversing two judgments of the Superior Court, the judgments in the Court below in the one case allowing respondent's action to enforce a builder's privilege in the amount of $10,121.21, and in the other dismissing appellant's action asking that the registration of such privilege be declared null and void.

Respondent is the trustee of the estate of one Raoul Lamont, a bankrupt, who in April 1953 had entered into a contract with appellant to construct an extension or addition to a hotel owned by the latter at Coaticook, Quebec. The facts are fully set out in the judgment of Mr. Justice Taschereau in the Court below and I need refer to them only briefly.

The contract to which I have referred is dated April 18, 1953, and it reads as follows:

18 avril 1953.

Contrat entre Mr. Charles Garceau de Coaticook, Que. pour une annexe à l'Hotel "Child" de 40' x 80' d'une étage de 14', fini tel que plans et devis que j'ai en mains et avec la coopération de Bernard Poitras et le Propriétaire. Ceci avec un pourcentage de 10% sur un montant de $16,000.00. S'il y a un excédent, je me charge de continuer le contrat sans aucune charge de pourcentage à condition que M. Charles Garceau, propriétaire de l'Hotel Child se charge de payer la différence de ce montant de $16,000.00 avec condition de $500.00 par mois jusqu'au règlement de la dette finale.

[1] [1960] Que. Q.B. *186*.

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Condition de règlement pour la première somme de $16,000.00

Premier paiement de $5,000.00 le 30 avril 1953
Deuxième paiement de $5,000.00 le 30 Mai 1953
Troisième paiement de $5,000.00 le 30 Juin 1953.
Balance de $1,000.00 sur règlement au mois de $500.00 par mois et au même condition s'il y a excédent du montant du contrat.

(signé) C. GARCEAU
(signé) RAOUL LAMONT

Concurrently with the execution of this agreement appellant furnished Lamont with a coloured sketch and rough plan and specification of the proposed extension. This sketch and plan were both filed as exhibits and it is clear that the details of construction of the proposed building, contained in the said plan, are very meagre indeed.

Lamont started work on April 20, 1953, and the whole project was completed on July 17, 1953. It is common ground that the cost of the work substantially exceeded the amount of $16,000 mentioned in the written contract. The Court below found that the cost of the work done and materials furnished by Lamont (aside from any compensation for his own services) amounted to $32,340.98. There was ample evidence to support that finding and, in fact, the appellant made no attempt to challenge its accuracy.

Appellant paid $16,000 in the manner specified in the contract and subsequent to the completion of the work he also paid suppliers of material to the extent of $1,478.77 and gave Lamont two promissory notes for $3,000 each, dated July 17, 1953, and July 24, 1953, respectively, both of which were paid at maturity. Total payments made by appellant therefore amounted to $23,478.77.

As I have said, appellant made no attempt to establish that the cost of the work done and materials supplied was not in excess of $30,000. Moreover, a report of Jean Julien Perrault, an architect who was appointed as an expert by the learned trial judge, established that the work done and materials furnished by Lamont had given an added value to the appellant's property of $30,900.

In his defence and at the trial appellant took the position (1) that the contract of April 18, 1953, was a contract at a fixed price within the meaning of art. 1690 of the *Civil*

*Code,* that he had authorized and paid for additions and alterations to a total amount of $7,478.70 only, and was liable for no further amount and (2) that in taking the promissory note for $3,000 dated July 24, 1953, to which I have referred, Lamont had accepted it in full and final settlement of all his claims.

As to appellant's second ground of defence, I am satisfied that there is no evidence to support his contention that the note for $3,000 dated July 24, 1953, was accepted by Lamont in final settlement of all his claims. Lamont denied that this note was in full and final payment of his claim, his evidence on this point being as follows:

Q. Maintenant, je vous repose la même question parce qu'il y a un fait nouveau: Lorsque ce billet du vingt-quatre (24) juillet "cinquante-trois" ('53), PG-6, a été donné, est-ce qu'il a été question que c'était en paiement final, qu'il ne vous devait plus rien?

R. Non. Moi, j'ai demandé ça pour qu'il me donne une chance pour passer ça à ma banque pour que je paye d'autres créanciers.

Q. Pour éviter la faillite?

R. Pour éviter la faillite, justement.

Moreover, it is to be observed that no fee for Lamont's services was included in the total payments of $23,478.70 made by appellant. Appellant obtained no final receipt from Lamont and the note for $3,000 dated July 24, 1953, bears no indication that it was given by appellant and accepted by Lamont in full and final settlement.

The question as to whether the contract in issue here comes within the provisions of art. 1690 of the *Civil Code* depends, of course, upon the interpretation and effect to be given to the agreement of April 17, 1953. In the Court below Mr. Justice Taschereau speaking for the Court held that it was not a contract at a fixed price under the terms of art. 1960 C.C. I share that view and there is little I can usefully add to what he has said in this respect.

Article 1690 C.C. contains an exception to the general rules as to proof and, as such, it must be strictly interpreted. Commenting on this article, Faribault in his "Traité du Droit Civil du Québec", vol. XII, page 450, says:

On distingue le marché à forfait absolu ou pur et simple, et le marché à forfait relatif. Il est absolu lorsque le propriétaire ne s'est pas réservé le droit ou le privilège de modifier les plans et devis durant le cours des travaux. Il n'est que relatif dans le cas contraire. L'article 1690 n'a d'application que si le contrat à forfait est absolu: lorsque ce contrat est relatif, on doit appliquer les règles ordinaires de la preuve.

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Comme l'article 1690 est une exception à la règle générale de la preuve, il doit être interprété restrictivement. Il n'a d'application que s'il existe un marché à forfait pur et simple, accompagné de plans et devis. Il ne peut s'appliquer si le contrat prévoit une possibilité de modifications dans les plans et devis, ou si ces derniers font entièrement défaut.

As I have stated, the details contained in the sketch and plan furnished to Lamont when the contract was entered into are very meagre indeed. It is obvious that such a sketch and plan could do no more than give a general idea of the extent and character of the work to be done, and it is equally obvious, in my opinion, that both parties contemplated there would be changes and alterations and that the cost would exceed $16,000. The only feature of the contract which is clear and precise is that the contractor Lamont would be paid for his services an amount limited to $1,600, being 10 per cent of $16,000.

The contract in issue here, even if undertaken upon a plan and specifications within the meaning of those terms as used in art. 1690 C.C.—as to which I have some doubt—was not, in my opinion, undertaken at a fixed price, and art. 1690 has therefore no application.

For the foregoing reasons and for those of Mr. Justice Taschereau in the Court below, with which I am in agreement, both appeals should be dismissed with costs.

*Appeals dismissed with costs.*

*Attorney for the appellant: R. Bouchard, Coaticook.*

*Attorneys for the respondent: Tremblay, Monk, Forget, Bruneau & Boivin, Montreal.*