PETER KIEWIT SONS' COMPANY OF CANADA LIMITED AND RAYMOND INTERNATIONAL COMPANY LIMITED, carrying on business under the firm name and style of KIEWIT-RAYMOND (*Defendant*) .....

APPELLANT;

1959
*May 12, 13
1960
Feb. 22

AND

EAKINS CONSTRUCTION LIMITED (*Plaintiff*) .....

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Sub-contractor—Action for breach of contract—Whether item of work covered by contract—Whether change in plans—Whether contract substituted by new and different one—Work done under protest—Whether only price of contract recoverable—Quantum meruit—Whether quasi-contractual recovery—Whether frustration.

The plaintiff, who took a sub-contract from the main contractor, the defendant, for a pile driving job, protested that he was being asked to do more than the sub-contract called for. The engineer, who had clearly defined duties under the main contract, insisted that the

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

work was according to the sub-contract and no more. The main contractor told the plaintiff that it would have to follow the orders of the engineer and made no promise of additional remuneration. The plaintiff completed the work under protest, and sued for damages for breach of contract and, in the alternative, for compensation on a *quantum meruit* basis. The trial judge dismissed the action, but this judgment was reversed by the Court of Appeal. The main contractor appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and the action dismissed.

Per Locke, Abbott, Martland and Judson JJ.: Having elected to do the work in these circumstances, the plaintiff could only recover under the contract. The contract could not have been abrogated and another substituted, since there was no consent, express or implied. When the positions of the parties became clear before any work was done, the proper remedy of the plaintiff was to refuse to go on except on its own interpretation of the contract and, if this was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause providing that the matter could be left in abeyance for later determination, the plaintiff could not go on with performance according to the main contractor's interpretation and then impose liability on a different contract.

The facts of this case did not justify an inference of frustration so as to remove the original contract and substitute an implied contract. A dispute over a question whether a certain item of work is an extra could not bring about frustration of a contract when the question of extras is covered by the contract. There is no room for the application of any theory of quasi-contractual recovery by way of implied contract or by the imposition of an obligation *ex aequo et bono*, when the parties, as in this case, have made an express contract covering the very facts in litigation and that contract remains open and unrescinded.

Per Cartwright J., *dissenting*: When the main contractor, knowing that the plaintiff was taking the position that it was being called on to do work outside the contract and would expect and demand to be paid for it, persisted, in circumstances of practical compulsion, in ordering that work to be done, the law imposed upon it the obligation to pay the fair value of the work performed, the benefits of which it had received. It was no answer to say that the plaintiff should have had the courage of its convictions and refused to perform any work beyond that which was required by the sub-contract. It must be remembered that that contract was difficult to construe. There is no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do.

Practice—Costs—Success against one of two defendants—Whether power to make "Bullock order" under British Columbia Rules.

Per Cartwright J.: In an action taken against two defendants and where success is obtained against one of them, the Court of Appeal for British Columbia has jurisdiction to order that the costs payable by the plaintiff to the successful defendant be recovered by the plaintiff

from the unsuccessful defendant. The operation of that rule is not limited to cases in which the issues raised are equitable. In the circumstances of this case, the order of this sort made by the Court of Appeal was a proper one.

APPEAL from a judgment of the Court of Appeal for British Columbia, reversing in part a judgment of Maclean J. Appeal allowed, Cartwright J. dissenting.

J. S. Maguire and *R. C. Bray,* for the defendant, appellant.

W. Kirke Smith, for the plaintiff, respondent.

The judgment of Locke, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant, on January 9, 1956, entered into a contract with the British Columbia Toll Highways & Bridges Authority, a government corporation, to build the substructure, approach viaduct and northern approach road to the Second Narrows Bridge across Vancouver Harbour for the sum of $4,314,369.70. The respondent took a sub-contract from the appellant to supply and drive the timber piles for the substructure of pier 1 and piers 7 to 14 at stated unit prices, which amounted to a total of $132,350. The respondent sued the Bridge Authority and the main contractor, the appellant, for damages for breach of contract or, in the alternative, for compensation on a *quantum meruit*. The learned trial judge dismissed the action against both defendants. On appeal the dismissal against the Bridge Authority was sustained but the appeal was allowed against the main contractor and the case remitted to the trial court for an assessment of the work done on piers 10 to 14 to be paid for on a *quantum meruit* basis. The main contractor now appeals to this Court and asks for the restoration of the judgment given at the trial. The respondent does not cross-appeal against the judgment of the Court of Appeal affirming the dismissal of the action against the Bridge Authority. The dispute here, therefore, is entirely between the main contractor, as appellant, and the subcontractor, as respondent.

Before making its tender, the sub-contractor, Eakins Construction Limited, had before it the plans and specifications and the principal contract. The plans required the

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

piles to be driven to a safe bearing capacity of 20 tons. The specifications required them to be driven to a minimum bearing capacity of 20 tons based on a certain formula. The pile driving contract was made on January 10, 1956, but some time in February, the engineer amended the plans by adding a requirement relating to piers 10 to 14 as follows: "Bottom of timber piles to be below bottom of sheet piling." T. K. Eakins, the managing director of the pile driving company, noticed the change at once. Beyond mentioning it to an official of the Kiewit Company, he did nothing. This was long before he began to work on the piers affected by the change and probably before any work was done on piers 7, 8, 9, which were not affected by the change. The work on these three piers was abandoned and settled for in March 1956 because the ground was too hard for the driving of wooden piles. Timber piling also proved to be impractical on pier 1. Steel piling was substituted at this pier. Kiewit did this work itself, Eakins having declined to tender for steel piling except on a cost plus basis. This leaves only the work on piers 10 to 14 at issue in this litigation.

Eakins began to work on pier 10, still without having made any protest about the change in the plans. At this pier wooden pile driving was also unsuccessful. After 22 piles had been driven, the engineer ordered them to be cut off and covered with gravel so that they would not become weight bearing. This work has not been paid for. Eakins submitted an account for this work which Kiewit refused to accept and offered a lesser amount. Eakins is entitled to payment for this work according to the terms of the contract. According to my judgment, this is all that Eakins is entitled to and if the parties cannot agree there will have to be a reference back to ascertain this amount. Clauses 7 and 9 of the contract cover this situation.

Eakins made its first protest that the amended plans provided for pile driving outside the terms of its contract just before it began to work on pier 11. The engineer insisted that the piles had to be driven as he required in accordance with the amended plans and Eakins proceeded with the work. There is no doubt that from this time on Eakins continued to protest that it was being required to do more work than its contract called for and it is equally

clear that the engineer insisted that his instructions be followed and that Eakins was entitled to no extra payment for what it chose to call "overdriving". The position taken by the disputants could not have been more clearly defined, the sub-contractor saying that it was working beyond its sub-contract and the engineer saying that it was not and threatening to put it off the job if it did not follow instructions.

Not until September 1956 did Eakins make any complaint in writing to Kiewit. When this brought no reply, Eakins wrote to the engineers, Messrs. Swan & Wooster, the employers of Stanwick, the resident engineer with whom Eakins had been having its controversy. This firm wrote to Kiewit saying that it realized that driving conditions had been difficult, but not entirely unexpected and that they did not "altogether agree that measures taken to obtain the desired results have been deviations from the contract." There is ample evidence of these difficulties but there is also evidence that not all of them arose from natural conditions. I am in agreement with the learned trial judge that some of them at least were the result of inefficient operation and inadequate judgment.

On January 29, 1957, a meeting was held at which Eakins, the engineers and Kiewit were represented. Everybody seems to have expressed sympathy for the Eakins company, which was close to being forced to abandon the contract owing to the pressing claims of creditors, but no one made any binding promise to pay anything extra. After this meeting, Eakins made a further complaint to the Bridge Authority on February 6 but did continue with the work which was completed on March 6, 1957.

The learned trial judge held that the sub-contractor was bound by all the terms of the main contract and that the addendum of which Eakins made so much was not a change in the plans at all but was added by way of clarification and for the information of the men in the field. After a careful analysis of the contract he came to the conclusion that this was within the engineer's defined powers. His conclusion, therefore, was that all the work was within the contract and that the claim for damages or compensation on a *quantum meruit* failed. On the other hand, the Court of Appeal took the directly opposite view that the obligation

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

of the Eakins Company was defined by its sub-contract, that the addendum was not a term of the sub-contract and that in any event those clauses of the main contract which were appealed to as authorizing the addendum, did not in fact authorize it. Since Kiewit knew that Eakins expected to be paid for the work done in compliance with the engineer's orders and which it claimed to be outside the contract and since Kiewit's officer had told Eakins that it would have to comply with the engineer's orders, the Court of Appeal held that Eakins was entitled to compensation for the whole job, not merely for the extra work, on a *quantum meruit*. The basis for this is that Eakins had not been working to the sub-contract at all but that the parties by their conduct and dealings had substituted for the original sub-contract a new and different contract with more onerous obligations on Eakins.

Had it been necessary to choose between these two views of the legal relations between the parties, I would have preferred the view of the learned trial judge that the Eakins company was performing no more than its contractual duty. But quite apart from this, it is to me an impossible inference in this case that the parties agreed to substitute a new contract for the original one. From the very beginning, the Eakins company knew of this added term. It began to protest late in the day that the term imposed added obligations. The engineer, who had clearly defined duties under the main contract, denied any such interpretation. Nothing could be clearer. One party says that it is being told to do more than the contract calls for. The engineer insists that the work is according to contract and no more, and that what is asserted to be extra work is not extra work and will not be paid for. The main contractor tells the sub-contractor that it will have to follow the orders of the engineer and makes no promise of additional remuneration. In these circumstances the sub-contractor continues with the work. It must be working under the contract. How can this contract be abrogated and another substituted in its place? Such a procedure must depend upon consent, express or implied, and such consent is entirely lacking in this case. Whatever Eakins recovers in this case is under the terms of the original sub-contract and the provisions of the main contract relating to extras.

The engineer expressly refused to order as an extra what has been referred to throughout this case as "overdriving". The work was not done as an extra and there can be no recovery for it on that basis. When this position became clear, and it became clear before any work was done, the remedy of the Eakins company was to refuse further performance except on its own interpretation of the contract and, if this performance was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause in the contract enabling it to leave the matter in abeyance for later determination, it cannot go on with performance of the contract according to the other party's interpretation and then impose a liability on a different contract. Having elected to perform in these circumstances, its recovery for this performance must be in accordance with the terms of the contract.

With this view of the relations among the parties, my conclusion is that there was error in the judgment of the Court of Appeal in permitting recovery on a new contract which it found as a fact to exist between the sub-contractor and the main contractor but not between the sub-contractor and the Bridge Authority. The basis of such recovery is obviously purely contractual in character and the principle is simply stated in Winfield on the Law of Quasi-Contracts, p. 52:

> Another application of *quantum meruit* is as a mode of redress on a new contract which has replaced an earlier one. The position is that the parties (or one of them) have not observed the terms of the earlier contract, but it can be implied from their conduct that they have substituted another contract for the first. If they do so, and one of the parties does not fulfil his side of the second contract, the other can sue *quantum meruit* upon it for what he has done. The obligation sued upon is genuinely contractual, not quasi-contractual.

Up to this point, there is no suggestion in the reasons of the Court of Appeal that the legal fiction of an implied contract is being applied to enable the plaintiff to recover on a quasi-contractual basis. The suggestion of quasi-contractual recovery does, however, appear in the reasons of the learned Chief Justice, the doctrine of frustration being invoked to get rid of the original contract:

> The evidence is clear that what the appellant (i.e. Eakins Construction Limited) contracted to do and what it actually did while at all times taking the position that the work done was not within the scope of its contract, was so different from that contemplated that in my

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

view the sub-contract ceased to be applicable and the work done by the appellant should be paid for as though no contract had been made, on a quantum meruit.

How can it be found that the contract ceased to be applicable? It did not cease to be applicable by consent of the parties and the case is not one where some supervening event or fundamental change in circumstances rendered further performance impossible or radically different from the contractual obligation. How can a dispute over a question whether a certain item of work is an extra bring about frustration of the whole contract when the question of extras is covered in elaborate detail by the contract itself? The principle to be applied is not in doubt. It was examined again as recently as 1956 in *Davis Contractors Ltd v. Fareham Urban District Council*[1], where *Bush v. Whitehaven Port and Town Trustees* (1888), Hudson on Building Contracts, 4th ed., vol. 2, p. 122, a case often appealed to in this type of dispute, was finally overruled. I take the statement of the principle from p. 729 of the *Fareham* case:

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.
>
> * * *
>
> It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

On any view of the facts of this case, there cannot be frustration. The performance of extra work will not justify it, even if such work was done. Extra work of the kind said to have been performed in this case is a contingency covered by the express contract and does not afford a ground for its dissolution. If there was to be extra pile-driving, the character and extent of the obligation to pay were fully covered in the contract. Even on the plaintiff's own view of the case, its performance was not radically different from that called for by the contract. The facts of the case do not justify an inference of frustration.

[1] [1956] A.C. 696.

There is, therefore, no room for the application of any theory of quasi-contractual recovery whether by way of the legal fiction of an implied contract or the decision of the Court in the particular case to impose an obligation *ex aequo et bono*. The facts upon which such a theory of recovery can be based do not exist in this case, where the parties have made an express contract covering the very facts in litigation and that contract still remains open and unrescinded. Their relations on matters covered by the contract are governed by it and the Court has no power to substitute another form of obligation. This truism is stated in American Law Institute's volume on Restitution, Quasi-Contracts and Constructive Trusts, c. 4, s. 107, in the following terms:

> (1) A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

Since the work done, if not covered by the sub-contract, was an extra which the engineer might have allowed under the terms of the main contract imported into the sub-contract, it was for Eakins to show that the sub-contract had been terminated, either by its repudiation by the contractor and an election to treat the contract as at an end or that it had been abandoned or terminated by agreement between the parties. It is perfectly clear that throughout the performance Kiewit insisted that Eakins was obligated to do the work to the satisfaction of the engineer under the terms of the main contract which, it was contended, were imported into the sub-contract. It is equally clear that Eakins at no time treated the sub-contract as being at an end, simply insisting that it did not cover the additional work.

If Eakins had asked the engineer for a written order for the performance of the work which it claimed to be beyond the sub-contract and that had been refused and Kiewit had persisted in its attitude, Eakins might then have treated the contract as repudiated and sued for damages. Having

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

failed to do this, and with the contract still open and unrescinded, it is my conclusion that any claim based upon any theory of quasi-contractual recovery is excluded.

I can find nothing in the terms of the contract under litigation nor in the events that occurred which could lead to the dissolution of this contract at any stage of its performance. I agree with the learned trial judge and I would allow the appeal with costs. The judgment at trial should be restored subject to a reference to ascertain, in accordance with the contract, the amount to be paid for the 22 piles cut off at pier 10.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia, allowing in part an appeal from a judgment of Maclean J..

The facts and the terms of the relevant documents are fully stated in the judgments in the Courts below but it is necessary to set them out in some detail in order to make clear the questions raised for decision.

On January 9, 1956, the appellant entered into an agreement, hereinafter referred to as "the principal contract", with the British Columbia Toll Highways and Bridges Authority, hereinafter referred to as "the Authority", to build the sub-structure, approach viaduct and northern approach road for the Second Narrows Bridge across Vancouver Harbour for the sum of $4,314,369.70.

On January 10, 1956, an agreement in writing, hereinafter referred to as "the sub-contract" was entered into between the appellant and the respondent. It was prepared by the appellant and is in the form of an order addressed by the appellant to the respondent and accepted by the latter. Attached to it is a letter of the same date addressed by the respondent to the appellant quoting its prices for piling and the amount per pile it proposed to charge for driving and cutting off the piles.

The sub-contract provides, *inter alia*:

> You are to furnish, drive, cut off and treat all the timber piles at the Second Narrows Bridge for us at such unit prices shown on your attached proposal dated January 10th, 1956.
>
> For the purposes of this Agreement, the Contractor is Kiewit-Raymond, 1104 Hornby Street, Vancouver, B.C. and the Subcontractor is Eakins Construction Company Limited, 900 Pacific Street, Vancouver 1, B.C. This document will serve as our Subcontract to you for the above-mentioned services.

You are to furnish these services as requisitioned by our Project Manager, Mr. Judson Howell, or his representative.

It is understood that all of the specifications of the Authority under which we are bound, apply equally to you as a Material Supplier. This involves not only the plans and specifications, but the contract terms regarding responsibility and insurance.

* * *

Kindly acknowledge receipt of this order and Subcontract and your acceptance of its terms and conditions as promptly as possible.

The sub-contract was for the supply, driving and cutting off of the timber piles for piers numbers 1, 7, 8, 9, 10, 11, 12, 13 and 14.

We are now concerned only with the question of the compensation, if any, due to the respondent for work done on piers 10, 11, 12, 13 and 14. The order for the supply and driving of timber piles on pier 1 was cancelled before anything had been done by the respondent. The driving of timber piles on piers 7, 8 and 9 was abandoned after a certain amount of work had been done but in regard to what was done on those piers there has been an accord and satisfaction. There is no cross-appeal from the judgments below holding that the respondent is not entitled to any further payment in respect of piers 1, 7, 8 and 9.

Prior to the signing of the sub-contract, the managing director of the respondent had in his possession a copy of the principal contract and the plans referred to in the specifications. The provision in the specifications as to the driving of timber bearing piles is as follows:

Piles shall be driven truly vertical and to the lines and levels shown on the plans. Piles shall be driven with standard equipment, steam or drop hammers, approved by the engineer, to a minimum bearing capacity of 20 tons based on the following formulae:—

$$P=2\ \frac{WH}{S+1}$$ if drop hammer is used

$$P=2\ \frac{WH}{S+0.1}$$ if steam hammer is used.

Butt edges of piles shall be chamfered before driving so that the hammer will strike the heartwood in the centre of the pile and the tops of the piles shall be protected by use of a steel mat to prevent splitting of the pile during driving.

The plans referred to in the specifications contained the following note:

6. All timber bearing piles to be driven to a safe bearing capacity of 20 tons.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

Shortly after the signing of the sub-contract the respondent returned the copy of the principal contract, specifications and plans. Just before commencing work, towards the end of February 1956, the respondent was furnished with another copy of the principal contract, specifications and plans and its managing director observed that a note had been added to the plans reading as follows:

10. Bottom of timber bearing piles to be below bottom of sheet piling.

This note was added by the engineer of the Authority at some date after the signing of the sub-contract. No addition to, or amendment of, the sub-contract was made to deal with the effect of this addition to the principal contract. The only piers in respect of which sheet piling was specified were numbers 10, 11, 12, 13 and 14.

The dispute between the parties arose out of the fact that the resident engineer of the Authority required the respondent to drive the timber bearing piles on piers 10 to 14 inclusive to a much greater depth than was necessary to achieve the safe bearing capacity of 20 tons provided in the specifications and in the note on the plans quoted above, which the respondent had before it when it entered into the sub-contract.

It is clear from the evidence; (i) that compliance with the demands of the resident engineer resulted in the respondent "over-driving" many of the piles at a cost greatly in excess of what would have been the cost of driving them to the specified safe bearing capacity of 20 tons; (ii) that the respondent repeatedly asserted both to Howell, the responsible officer of the appellant, and to Stanwick, the resident engineer in charge of the work for the Authority, that it was being called upon to do and was doing work which it was not obligated to do under its contract, was being put to heavy additional expense and would expect to be paid for that work; (iii) that the engineer maintained throughout that the respondent was bound to do any over-driving he directed and that the Authority was not obligated to make any payment therefor; (iv) that the appellant told the respondent that the respondent must comply with the orders of the engineer.

After the respondent had completed the work on piers 10 to 14 inclusive, to the satisfaction of the engineer including all the over-driving ordered by the latter, it made efforts to obtain payment from either the Authority or the appellant; but the Authority would pay nothing and the appellant was not willing to pay anything to the respondent over and above the unit prices specified in the sub-contract.

The respondent brought action against both the Authority and the appellant claiming in effect that it had been required to do work so far beyond the scope of its sub-contract that that contract should be regarded as having been cancelled by the defendants and they should be ordered to pay to the plaintiff the value of the materials furnished and the work performed by the respondent on an implied contract to pay, on a *quantum meruit,* the value of what it had done at their request.

The learned trial judge dismissed the action as against both defendants. On appeal to the Court of Appeal the judgment of the learned trial judge in so far as it dismissed the action against the Authority was affirmed; no appeal has been taken to this Court from that affirmation and consequently we are concerned only with the respondent's claim against the appellant.

The Court of Appeal allowed the respondent's appeal from the dismissal of its action against the appellant. The formal judgment of the Court of Appeal provides in part as follows:

AND THIS COURT DOTH FURTHER ORDER AND DECLARE that the Appellant is entitled to compensation on a quantum meruit basis from the Respondents Peter Kiewit Sons Company of Canada Limited and Raymond International Company Ltd. for work done and materials supplied on Piers 10, 11, 12, 13 and 14.

AND THIS COURT DOTH FURTHER ORDER AND DIRECT that the assessment of the amount of such compensation be referred back to the Court appealed from for determination in accordance with the findings of this Honourable Court, with liberty to the parties to adduce such additional evidence at the said hearing as they or any of them may be advised.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondent British Columbia Toll Highways and Bridges Authority do recover from the Appellant its costs here and below after taxation thereof;

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Appellant do recover from the Respondent Peter Kiewit Sons of Canada Ltd. its costs here and below after taxation thereof, together with all costs payable hereunder by the Appellant to the Respondent British Columbia Toll Highways and Bridges Authority.

The appellant relied on cls. 3, 4, 6 and 7 of the principal contract which it argued bound the respondent as well as the appellant; these read as follows:

3. The work shall be commenced forthwith on the execution of this agreement, and carried on and prosecuted to completion by the contractor in all the several parts in such manner and at such points and places as the engineer shall from time to time direct, and to the satisfaction of the engineer, but always according to the provisions of this contract. The contractor shall deliver the work complete in every particular to the Authority on or before the date or dates following, viz:

* * *

Time shall be deemed to be material and of the essence of this contract.

4. The works shall be constructed by the contractor under his personal supervision, of the best materials of their several kinds, and finished in a workmanlike manner, and in strict conformity with this contract, and to the complete satisfaction of the engineer.

6. The several parts of this contract shall be taken to explain each other and to make the whole consistent; and if it is found by the engineer that anything is necessary for the proper performance or completion of the work or any part thereof, the provisions for which are omitted or misstated in this contract, the contractor shall, at his own expense, at the direction of the engineer, perform and execute what is necessary to be done, as though provision therefor had been properly made and inserted and described in this contract. The correcting of any such error shall not be deemed to be an addition to or deviation from the terms of this contract.

7. The engineer may, IN WRITING, at any time before the final acceptance of the works, order any additional work, or materials or things, not covered by the contract, to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient, in or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location, or position of the works, or any portion or portions thereof, or in any materials or things connected therewith, or used or intended to be used therein, or in any other thing connected therewith, or used or intended to be used therein, or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done, or the materials or things to be provided, or the cost of doing or providing the same; and the engineer may, in such order, or from time to time as he may see fit, specify the time or times within which such order shall, in whole or in part, be complied with. The contractor shall comply with every such order of the engineer. The decision of the engineer as to whether the compliance with such order increases or diminishes the work to be done, or the materials or things to be provided, or the cost of doing or providing the same, and as to the amount to be paid or deducted, as the case may be, in respect

thereof, shall be final. As a condition precedent to the right of the contractor to payment in respect of any such order of the engineer, the contractor shall obtain and produce the order, in writing, of the engineer, and a certificate, in writing, of the engineer, showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

The learned trial judge was of opinion that under the terms of the principal contract, particularly cls. 6 and 7 quoted above, the engineer was entitled to add note 10, "Bottom of timber bearing piles to be below bottom of sheet piling", that that addition was not actually a change in the plans at all, but that even if it could be said that the addition was a change it was one permitted by para. 1-8 of the specifications in the principal contract which reads as follows:

1-8 *Alterations to Drawings.* It shall be understood that the drawings represent the nature of the work to be executed and not necessarily the works exactly as they will be carried out. The Engineer shall, without invalidating the contract, be at liberty to make any reasonable alteration or to furnish any additional or amended drawings which do not radically change the type of construction.

The value of such alterations shall be ascertained by measurement and at the rates set forth in the Schedule of Approximate Quantities and Prices or at the rates to be settled as herein provided and may be added to or deducted from the contract sum as the case may be.

The learned trial judge goes on to hold that all the work done by the respondent including the "over-driving" was within the purview of the principal contract; and it is implicit in his reasons that the respondent was bound under the sub-contract to perform all the obligations in regard to the supplying and driving of timber bearing piles which rested upon the appellant under the principal contract. In reaching the last mentioned conclusion the learned trial judge appears to have proceeded not so much on the construction of the terms of the written sub-contract as on the evidence of the managing-director of the respondent, T. K. Eakins. This appears particularly from the following two passages in his reasons:

The managing director of the plaintiff, Mr. Eakins, admitted both in the discovery and in his evidence at the trial that he considered himself bound by the provisions of the principal contract as contained in this Exhibit 3. His conduct throughout was consistent with this statement.

* * *

Mr. Eakins admits that he was bound by the main contract, and that the resident engineer Stanwick had never promised to pay him for his so-called "over-driving".

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

Having found that the addition to the plans was permitted under the terms of the principal contract and that the respondent was bound thereby the learned trial judge concluded that all the work done by the respondent was done in fulfilment of its obligations under an express contract and that consequently no contract to pay anything beyond the amounts provided in that express contract could be implied. This conclusion cannot be questioned if the finding on which it is based is accepted.

It will be observed that the sub-contract is silent as to the depth to which piles are to be driven and the conclusion seems to me to be inescapable that in agreeing to its terms both the appellant and the respondent contemplated that the obligation assumed by the latter was to drive and cut off the piles in accordance with the provisions of the principal contract as they existed on that date, that is before the addition of note 10 to the plans. It is not necessary to quote at length from the evidence; the following extracts from that of T. K. Eakins sufficiently express his view:

> Q. And are you aware of the contract specifications?
>
> A. Certainly I am aware of that.
>
> Q. And you bid on them?
>
> A. Yes.
>
> Q. Are you seriously trying to tell this Court you didn't think you were bound by the provisions of that main contract?
>
> A. Of course I felt I was bound by the main provisions of the contract, because, as I say, in as regards they told me how to drive a pile, and what was expected, that's what they expected to do, and of course I went along with that.
>
> Q. And those were in your letters of November 23rd and other letters here, I believe, that you quote the sections of the contract in defence of your own position?
>
> A. That's right. Yes.
>
> * * *
>
> A. I felt that as long as I put down a stable pile to 20-tons I was completing my contract. That is what I contracted to do, that is what I went in to do, but that is not what I was allowed to do.

It is not necessary to determine whether the appellant either expressly or by its conduct agreed with the Authority that the piles should be driven in accordance with the terms of the principal contract with the addition of note 10, without the payment of additional compensation. It is clear that the respondent not only did not so agree but repeatedly and

vigorously protested that its obligation was limited to driving and cutting off the piles so that they were stable, truly vertical, conformed to the lines and levels shown on the plans and were driven to a safe bearing capacity of 20 tons based on the formula set out in the specifications and quoted above. It should be noted that the evidence of all the witnesses who testified on the point was in agreement that the words in the specifications—"piles shall be driven . . . to the levels shown on the plans"—refer to the levels of the tops of the piles after they have been driven and cut off, and having nothing to do with the prescribed depth of penetration.

Counsel for the appellant contends that, throughout the proceedings, the significance of the addition of note 10 to the plans has been greatly exaggerated, as, in his submission, the evidence shews that in the numerous discussions between the engineer and the representatives of the respondent the former reiterated that the piles were to be driven to the depth that satisfied him rather than to a depth greater than that to which the sheet piling had been driven. The addition has, however, this importance that without it there was nothing in the principal contract (other than the general powers of the engineer defined in cls. 6 and 7) or in the specifications or in the plans requiring the appellant or the respondent (in so far as the latter had assumed the obligations of the former) to drive the piles to a greater depth than was necessary to achieve the safe bearing capacity of 20 tons in accordance with the specified formula.

It is significant that there was no denial of the testimony of T. K. Eakins and H. G. Eakins that the respondent was compelled to do driving to the extent of three to four times the amount necessary to achieve the specified safe bearing capacity. The only attack made on the accuracy of their evidence on this point is found in the evidence of Stanwick who stated that defects and failures in the driving equipment used by the respondent made it difficult to determine whether any particular pile had been "over-driven".

In my view, on the true construction of the sub-contract interpreted, as it must be, in the light of the circumstances surrounding its execution, the respondent agreed to perform the obligations of the appellant as to the supplying, driving

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

and cutting off of the piles on the piers with which we are concerned as those obligations were defined in the principal contract (including the specifications and plans) as it existed when the sub-contract was made. The evidence shews that the respondent was called upon to do, and did do, work greatly in excess of those obligations.

Proceeding on the assumption that cls. 3, 4, 6 and 7 of the principal contract were incorporated into the sub-contract, Sheppard J.A., after a careful analysis of those clauses and of the relevant portions of the specifications, concluded that they did not authorize the adding of note 10 to the plans or the requirement by the engineer that the respondent should drive the piles to a penetration greatly in excess of that specified. I agree with this conclusion and with the reasons leading to it stated by the learned Justice of Appeal.

In my opinion the evidence supports the view expressed by the learned Chief Justice of British Columbia in the following paragraph:

> The evidence is clear that what the appellant (i.e. Eakins Construction Limited) contracted to do and what it actually did while at all times taking the position that the work done was not within the scope of its contract, was so different from that contemplated that in my view the sub-contract ceased to be applicable and the work done by the appellant should be paid for as though no contract had been made, on a quantum meruit.

It can scarcely be denied that the work done by the respondent, under continuing protest, was done under circumstances of practical compulsion. It is clear that Howell repeatedly told the officers of the respondent that they must obey the instructions of the engineer as to the depth to which the piles were to be driven regardless of their views as to the meaning of the contract and the specifications. The sort of pressure exerted on the respondent by Howell is testified to by T. K. Eakins and H. G. Eakins and is exemplified in the following passage in the evidence of the latter:

> Mr. Howell reported that their project was some months behind in its schedule, that it was of paramount importance to carry this foundation work on to its completion so that they, in turn, could keep up their working schedule, that if we did not continue to the completion of the work he had no alternative but to call in the bonding company to take over, in which case, he pointed out, not only would the company (i.e the respondent) sacrifice that which remained but would be subject to extra-ordinary charges which are generally observed when a bonding company takes over.

Howell was not called as a witness and there is no denial of this evidence.

Howell, with the fullest knowledge that the respondent was taking the position that it was being called to do work entirely outside its contract and would expect and demand to be paid for it (a position which, in my opinion, both in fact and in law it was justified in taking) persisted in ordering that work to be done. In these circumstances the law implies an obligation on the part of the appellant to pay for that work of the performance of which it has had the benefit. I find some difficulty in basing the appellant's liability on an implied contract when the evidence shows that the respondent was repeatedly pressing the appellant to agree that it would pay for the work which it was doing and which did not fall within the terms of the sub-contract, and the appellant instead of so agreeing was making only "nebulous statements" to the effect that the respondent ought to be paid or that "there was something coming to" the respondent. I prefer to use the terminology which has the authority of Lord Mansfield and Lord Wright and was adopted by this Court in *Deglman v. Guaranty Trust Company of Canada and Constantineau*[1], particularly at pages 734 and 735, and to say that the appellant having received the benefits of the performance by the respondent of the work which the latter did at the insistence of the former the law imposes upon the appellant the obligation to pay the fair value of the work performed.

It is said that the respondent (who held what turns out to be the right view as to the meaning of the sub-contract) should have had the courage of its convictions and refused to perform any work beyond that which was required by the sub-contract, and when this resulted in its being put off the job should have sued the appellant for damages. It must, however, be remembered that the sub-contract was so difficult to construe that there has been a difference of judicial opinion as to its true meaning. The appellant (who held what turns out to be a mistaken view as to the meaning of the sub-contract) threatened the respondent with what might well amount to financial ruin unless it did the additional work which the sub-contract did not obligate it to do.

[1] [1954] S.C.R. 725, 3 D.L.R. 785.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

To say that because in such circumstances the respondent was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous the appellant may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character, which, in my opinion, can and should be prevented by imposing upon the appellant the obligation to pay to which I have referred above.

The case appears to me to be analogous to those in which a person who has paid money, under protest and under circumstances of practical compulsion, to another who was not in law entitled to the payment can recover it back by action. A number of the leading cases which illustrate the application of that principle are collected and discussed in the judgments delivered in this Court in *Knutson v. The Bourkes Syndicate*[1]. The judgment of Kerwin J., as he then was, concurred in by Rinfret, Crocket and Taschereau JJ., makes two things clear: (i) that it makes no difference whether the duress be of goods and chattels or of real property or of the person; and (ii) that in such cases the plaintiff's right to recover is not affected by the circumstance that the defendant honestly believed he was entitled to the payment which he demanded.

The concluding paragraph of the judgment of Kerwin J. at page 425 reads as follows:

> Here the evidence is plain that the payments were made under protest and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O. L. Knuston thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment.

I can discern no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do; in the one case money is improperly obtained, in the other money's worth. The remedy in the former case

[1] [1941] S.C.R. 419, 3 D.L.R. 593.

is to order repayment of the money; the remedy in the latter case should be, in my opinion, to order the person who has compelled the doing and has reaped the benefit of the work to pay its fair value. It would, I think, be a reproach to the administration of justice if we were compelled to hold that the courts are powerless to grant any relief to a plaintiff in such circumstances.

It is argued for the appellant that if the appeal does not succeed *in toto* the order of the Court of Appeal should be varied to provide that the respondent is entitled to be paid on a *quantum meruit* basis for that work only which was done over and beyond the work called for by the subcontract. On this point I am in agreement wtih the Court of Appeal and am content to adopt the reasons of Sheppard J.A. for rejecting this submission.

For the above reasons I have reached the conclusion that the appeal on the substantive claim should be dismissed.

It was contended, however, that the Court of Appeal did not have jurisdiction to order that the respondent should recover from the appellant the costs of the trial and in the Court of Appeal payable by the respondent to the Authority. This submission is based on the following decisions which are set out in the appellant's factum and which counsel for the respondent submits were wrongly decided: *Hampton v. Park*[1], *Union Bus Sales Ltd. v. Dueck on Broadway Ltd. et al.*[2] and *Loonam et al. v. Mannix Ltd. et al.*[3]. These are all decisions of single judges and until the present case the question does not appear to have been considered by the Court of Appeal for British Columbia.

The English practice in regard to the making of a "Bullock order" is well settled. The cases are collected in 26 Halsbury, 2nd ed., p. 98, s. 186, and in the Supplement. Their effect is summarized in s. 186 as follows:

> Where there are two defendants reasonably sued as being liable jointly or in the alternative, the unsuccessful defendant may be ordered to pay to the plaintiff the costs payable by him to the successful defendant or to pay the costs of the successful defendant direct to him.

Assuming that there was jurisdiction to make it, the order of the Court of Appeal was proper under the circumstances of the case at bar in which the appellant took

[1] (1937), 3 W.W.R. 662, 52 B.C.R. 294, 4 D.L.R. 726.
[2] (1958), 26 W.W.R. 527.
[3] (1959), 27 W.W.R. 424.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

the position, *inter alia,* that if the respondent was entitled to be paid more than the price stipulated in the sub-contract its right of recovery was against the Authority rather than the appellant.

There is no doubt that the three cases relied upon by the appellant decide that in British Columbia there is no jurisdiction to make a "Bullock order" in cases in which equitable issues do not arise.

The first of the cases mentioned above is a decision of Murphy J. It is based on the decision of Clement J. in *Green v. British Columbia Electric Railway et al.*[1]. That learned Judge discusses the question of costs at pages 79 et seq of the report and takes the view that the cases establishing the English practice are based on s. 5 of the *Supreme Court of Judicature Act* (1890), 53 and 54 Vict. C. 44, which reads:

> 5. Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

The learned judge points out that there is no such clause in the British Columbia statutes and rejects the submission that the jurisdiction can be inferred from the wording of Order LXV, rule 32, of the British Columbia Rules of Court:

> Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff.

In his view, scope for the operation of this rule is to be found in cases in which the issues raised are equitable.

The decision in *Green v. British Columbia Railway Co., supra,* was criticized by Morrison C.J. in *Rhys v. Wright and Lambert*[2], but it was not necessary for the learned Chief Justice to express a final opinion in regard to its correctness.

[1] (1915), 9 W.W.R. 75, 25 D.L.R. 543, 19 C.R.C. 240.
[2] (1931), 2 W.W.R. 584, 43 B.C.R. 558, 3 D.L.R. 428.

In *Hampton v. Park, supra,* Murphy J. felt himself bound by the decision of Clement J. but he does not appear to have agreed with it. He says at page 664.

> The correctness of the *Green* decision on the alternative proposition, (i.e. that the Court was without jurisdiction to make a "Bullock order"), is, I think, questionable but inasmuch as it is strictly in point, has stood unimpeached on this aspect for many years and has been followed in at least two instances I do not think it is open to me to disregard it as a precedent.

Union Bus Sales Ltd. v. Dueck, supra, was decided by Ruttan J. and *Loonam et al. v. Mannix Ltd., supra,* by Manson J. Both of these learned Judges were of opinion that they should follow *Hampton v. Park.*

If the matter were *res integra* it would be my opinion that the Supreme Court of British Columbia has jurisdiction to make an order of the sort in question in any proper case whether the issues raised are legal or equitable.

Section 9 of the *Supreme Court Act,* R.S.B.C. 1948, c. 73, provides:

> The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

The Laws Declaratory Act, R.S.B.C. 1948, c. 179, provides by s. 2, subs. 34:

> Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail:

In *Green v. British Columbia Railway, supra,* Clement J. was of opinion that the Supreme Court of British Columbia would have jurisdiction to make a "Bullock order" in a case where the issues were equitable, and this view is supported by the English authorities.

In the case of *Sanderson v. Blyth Theatre Co.*[1], a common law action, in which such an order was made, Romer L.J. says at p. 539:

> This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground

[1] [1903] 2 K.B. 533.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant.

and at p. 544 Vaughan Williams L.J. says:

I concur in the judgments of my learned brethern because I think there is jurisdiction under the old Chancery practice for ordering the recoupment of costs directed to be paid by another litigant.

Order LXV, Rule 1, marginal rule 976, of the British Columbia Rules of Court provides:

1. Subject to the provisions of these rules the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall follow the event, unless the Court or Judge shall, for good cause, otherwise order . . .

It will be observed that, in the case at bar, on the view of Romer L.J., quoted above, the costs, under the order of the Court of Appeal are following the event. The successful Authority is awarded its costs as against the plaintiff, the successful plaintiff is allowed to recover them over from the unsuccessful defendant as "costs reasonably and properly incurred by the plaintiff as between him and the last-named defendant."

The view that jurisdiction exists is supported by the wording of order LXV, rule 32 of the British Columbia Rules of Court quoted above.

The operation of that rule is not, I think, limited to cases in which the issues raised are equitable. Such a distinction would be anomalous in a court having the widest jurisdiction over all cases and in which the rules of equity, in case of conflict, prevail over those of the common law. The wording of the rule presupposes the existence of the power to make a "Bullock order" and gives an alternative power to order payment directly from one defendant to another.

Unfortunately, we have not the benefit of any detailed expression of the reasons which brought the Court of Appeal to the conclusion that the cases relied upon by the appellant on this point ought not to be followed, but, in my respectful opinion, the Court of Appeal had jurisdiction to make the order as to costs which it did make and that order was a proper one under all the circumstances.

I would dismiss the appeal with costs.

Appeal allowed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the defendant, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.

Solicitors for the plaintiff, respondent: Gilmour & Company, Vancouver.

1960

PETER KIEWIT SONS' CO. *v.* EAKINS CONSTRUCTION LTD.

Cartwright J.