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* Nov. 4,5,6, 7,10,11.
* Dec. 8.

HIS MAJESTY THE KING (DEFENDANT) ..... APPELLANT;

AND

PARADIS & FARLEY INC. (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Contract—Construction of wharf—Furnishing and driving steel piles into soil—Work completed—Petition of right—Claim by contractor for damages and additional compensation—Soil alleged to be of a different nature than indicated in plans and specifications—Unforeseen difficulties—Quantum meruit—Implied contract—Contract to be considered as law of parties—Statutory law—Exclusive jurisdiction of the Exchequer Court of Canada in matter of claims arising out of contract entered by the Crown—Additional compensation not allowed under section 48 of the Exchequer Court Act.

In 1936, the Minister of Public Works, acting on behalf of His Majesty the King in right of the Dominion of Canada, asked for tenders for the construction of a wharf at Rimouski, in the province of Quebec. Plans and specifications, prepared by the engineers of the Department of Public Works, were furnished to the tenderers; and a specific clause therein provided that the contractor would "be required to sign a contract similar to the form exhibited at the same time as the plans and specifications." The respondent's tender for $365,750.18, being the lowest, was accepted by Order in Council passed on the 10th of February, 1937; and, on the 23rd day following, a contract was entered between the Crown and the respondent embodying the terms and conditions under which the works would be performed. The major item of the contract was the furnishing and driving into the soil of a number of steel piles of interlocking type. The respondent performed the entire work. In May, 1938, the respondent claimed by petition of right from the appellant a further sum of $160,000 for damages and additional compensation. The claim was based on the ground that the unit price tendered by the respondent would have been sufficient to cover the work, leaving a reasonable profit, if the soil into which the piles had to be driven had been as described in the plans and specifications, which were declared to be part of the contract; but the respondent alleged that it encountered a certain material called "hard pan" and many large boulders therein embedded, thus necessitating extra work and putting the respondent to very large additional expenses. The respondent's claim was, as alleged, for compensation for work not foreseen in the agreement and performed "hors du contrat," under an implied contract, i.e., for works accepted by the Crown for which no compensation has been paid, on a "quantum meruit" basis. The Exchequer Court of Canada maintained the respondent's petition of right, holding that the latter was entitled to a sum of $119,597.22; but deducted one-third of that amount owing to loss of time, delay and incompetence

* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

attributable to the respondent. Both parties appealed to this Court, the Crown to have the claim dismissed and the respondent to have the amount awarded in the Court below increased.

Held, reversing the judgment of the Exchequer Court of Canada, that, in view of the terms of the contract, which is the law of the parties and by which this Court is bound, the respondent's petition of right should be dismissed. The respondent tendered to furnish and drive the piles in a soil the nature of which it agreed to investigate, and which the appellant did not guarantee, but merely indicated with some reserves as being of a certain kind or nature. The works to be performed by the respondent were fully covered by the contract and the obligation of the respondent was not to drive piles in a *specified* soil, but in a *specified place*. The risk was upon the respondent, and having assumed it, it must necessarily bear all the consequences, financial and others, if it misjudged the works to be performed and miscalculated the cost of the enterprise. Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent had the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its undisputable right to benefit, if the soil had been more favourable and easier than foreseen.

Held, further, that the contentions of the Crown could also be upheld upon statutory law: the Exchequer Court of Canada, under section 18 of the *Exchequer Court Act,* has exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown; and section 48 of that Act limits the jurisdiction of that Court and does not allow it to grant any additional compensation.

Held, further, that, assuming that the claim of the respondent was not covered by the contract, it would still fail; for then it would have to be founded on an implied contract; and the agreement itself contains a clear declaration of the parties that "no implied contract of any kind whatsoever, by or on behalf of His Majesty, shall arise or be implied from anything in this contract contained."

Decision of the Judicial Committee of the Privy Council in *The King* v. *Vancouver Lumber Co.* (50 D.L.R. 6) has no application to this case, inasmuch as a form of contract, similar to the one subsequently signed by the respondent, had been annexed to the plans and specifications.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada, maintaining the respondent's petition of right and awarding a sum of $79,731.48.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

Ls. St-Laurent K.C., Valmore Bienvenue K.C. and *Amédée Caron K.C.* for the appellant.

Thomas Vien K.C. and *Léon Faribault K.C.* for the respondent.

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The judgment of the Court was delivered by

TASCHEREAU J.—In 1936, the Minister of Public Works acting on behalf of His Majesty the King, asked for tenders for the construction of a wharf at Rimouski, in the province of Quebec. Plans and specifications prepared by the engineers of the Department were furnished to the tenderers, and by Order in Council passed on the 10th of February, 1937, the respondent's tender for $365,750.18 was accepted as being the lowest. On the 23rd of February of the same year, a contract was entered into between the appellant and the respondent, embodying the terms and conditions under which the works would be performed.

In May, 1938, the contractor Paradis & Farley Inc., respondent in the present case, claimed by petition of right from His Majesty the King the sum of $160,000 for damages and for additional compensation. The Exchequer Court of Canada accepted the argument submitted by the respondent, that the plans and specifications were misleading, that the soil, in which a certain number of piles were to be driven, was of a different nature and harder than indicated in the boring sheets prepared by the Department, and that a certain portion of the works performed was not covered by the contract. The learned trial judge reached the conclusion that, for these additional works, not included in the amount of the tender, the contractor was entitled to $119,597.22. Of this amount, however, he deducted one-third, because he thought there had been loss of time, delay and incompetence attributable to the suppliant. As a result of this deduction, judgment was given for $79,731.48 with interest and costs. Both parties now appeal to this Court, His Majesty the King to have the claim dismissed, and the respondent to have the amount awarded in the Court below increased.

The major item of the contract was the *furnishing* and *driving* into the soil, at an average depth of 42½ feet below the river bed, of a number of steel piles of interlocking type, on a double parallel row of 700 feet long and 100 feet wide. The unit price for this specific work, tendered by the suppliant, was $1.95 per sq. ft., and it is submitted that this price was based upon the assumption that the soil into which the piles were to be driven, was of " sand, gravel, few stones, loose clay, stiff and sticky clay, tough

clay," as revealed by the boring plans and specifications which were declared to be part of the contract. The driving of these piles into a relatively soft material, as described in the boring indications, did not, it is claimed by the respondent, involve work of a very difficult nature and the unit price of $1.95 was sufficient to cover the furnishing and the driving of the piles, leaving a reasonable profit.

But the respondent submits that instead of encountering the material it had been led to expect, it encountered what is called "hard-pan," a substance dry in its natural state, devoid of lubricating properties, and plentifully interspersed with large boulders therein embedded, requiring continuous driving for very long periods, and in certain occasions drilling and blasting. And it follows that having done the work after protesting, the respondent was put to very large additional expenses. The claim is not for compensation for works contemplated by the parties and covered by the contract, but is for compensation for other works not foreseen in the agreement, performed "hors du contrat," under an implied contract; it is for works accepted by the Crown for which no compensation has been paid on a "quantum meruit" basis.

I think I should dispose now of the contention that this claim could be based on "tort" arising out of the fact that the information given was erroneous and misleading. Although the learned counsel for the respondent did not particularly press this point, he nevertheless stated that he did not abandon it. It is settled, I believe, that there cannot be an action in "tort" against the Crown unless it be founded on a statute, and none has been cited to us that could substantiate this claim. On this point the case of *Bishop* v. *MacLaren* (1), decided by the Judicial Committee, has no application; and although there is some similarity between that case and the one at bar, there is also the essential difference, that their Lordships had to deal with claims arising between subject and subject, and that we have now to consider a petition against His Majesty.

It is particularly on the ground of "quantum meruit" for works unforeseen in the agreement that the respondent submits its case, and it is on that ground also that the learned trial judge allowed an additional compensation.

(1) [1937] 2 D.L.R. 625.

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The specifications contained the following clauses which are the most important and most relevant to the present issue:—

2. (*b*) Steel sheet piling.—Driving interlocking steel sheet piling, where and as shown on plan and as shall be directed by the Engineer.

4. Soundings and borings.—Soundings, levels and borings have been carefully taken but intending contractors are required to take, before they tender, the soundings, levels and borings they may deem necessary to satisfy themselves as to the accuracy of the information conveyed by plans and specifications.

Should the contractors find, on the site of the proposed work, any obstruction not shown on the plan, they shall remove such obstruction at their own cost.

The Contractors are warned that they shall be held entirely responsible and liable for any increase in the cost of the proposed work, if obstructions have to be removed to permit the driving of the steel sheet piles in correct alignment where and as shown on the plan.

Tenderers are hereby given notice that it shall be taken for granted that the above has been given due consideration in the preparation of their tender.

6. (3) The unit price tendered shall include the cost of purchasing, transporting, painting, driving and boring the piles, and the cost of the removal of obstructions impeding the driving of the piles, if any.

35. As it is known that driving will be unusually severe, before the Engineer gives authority for the use of any type of steel piling for this work he will require to be provided with satisfactory evidence as to the driving qualities of the section suggested derived from actual experience in practice.

37. Notwithstanding this, the contractor shall be entirely responsible for the correctness and accuracy to the satisfaction of the Engineer, in spite of all difficulties including risk of piles meeting obstructions of any kind in the course of the pile driving.

Tenders and general conditions
(for unit prices)

4. Contract.—The contractor would be required to sign a contract similar to the form exhibited at the same time as the plans and specifications.

7. No claim for extra work or materials of any nature will at any time be recognized or entertained by the department unless the contractor has first obtained a written order therefor from the Engineer.

10. Parties intending to tender for these works are especially requested to visit the place and site of the proposed work, and make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

37. No claim for extras will be entertained by the department on account of unforeseen difficulties in the carrying out of the work herein specified.

As already stated, an Order-in-Council was passed on the 10th of February, 1937, accepting the tender of Paradis & Farley Inc., and on the 23rd day of February,

1938, a contract was signed between the suppliant and His Majesty the King. In the contract there are the following clauses:—

4. The works shall be constructed by the contractor, and under his personal supervision, of the best materials of their several kinds and finished in the best and most workmanlike manner and in the manner required by and in strict conformity with this contract, the said specifications and special specifications and the plans and drawings relating thereto, and the working or detailed drawings which may from time to time be furnished (which said specifications and special specifications, plans and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the Engineer.

45. It is distinctly declared that no *implied* contract of any kind whatsoever by or on behalf of His Majesty shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by His Majesty are and shall be the only contracts, covenants and agreements upon which any rights against His Majesty are to be founded.

And the last two clauses of the contract read as follows:—

56. This contract is made and entered into by the contractor and His Majesty on the distinct understanding that the contractor has, before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be provided, and that the execution of this contract by the contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information made or given, or upon any information derived from any quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by His Majesty or any of His officers, employees or agents; and that any such statement, representation or information, if so made, given or furnished, was made, given or furnished merely for the general information of bidders and is not in anywise warranted or guaranteed by or on behalf of His Majesty; and that no extra allowance will be made to the contractor by His Majesty and the contractor will make no claim against His Majesty for any loss or damage sustained in consequence of or by reason of any such statement, representation or information being incorrect or inaccurate, or on account of unforeseen difficulties of any kind.

57. In the event of any inconsistency between the provisions of this contract and the provisions of the specifications forming part hereof the provisions of the specifications shall prevail.

The stand taken by the Crown is that the borings and plans were only indicative of the works which were to be performed, and that the tenderer, under the terms of the specifications, was required to take the necessary soundings, levels and borings to satisfy itself as to the accuracy

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of the information conveyed by the appellant. It is further alleged that there cannot be any additional compensation on a basis of "quantum meruit," the works executed having been contemplated by the parties and covered by the contract. The obligation assumed by the contractor was not to drive the piles in a specified soil, but to drive them in a specified place, "where, and as shown on the plan," whatever the unforeseen difficulties might be.

I accept the view that the works performed by the respondent were fully covered by the contract, and that the obligation of the suppliant was not to drive piles in a specified soil, but to drive them in a specified place. The words in the specifications "where and as shown on the plan" mean clearly that the respondent is obligated to drive these piles in a certain area determined in the plans for the price of $1.95 per sq. ft. It was understood that tenderers were required to take the soundings, levels and borings

> they may deem necessary to satisfy themselves as to the accuracy of the information conveyed by plans and specifications.

In another clause, it is stated:

> The unit price tendered shall include the cost of purchasing, transporting, painting, driving and boring the piles, and the cost of the removal of obstructions impeding the driving of the piles, if any.

And, further, there is a warning that the driving will be "unusually severe" and another clause in which we find that

> the unit rate to include all charges for supplying, handling, placing, driving, drilling, and tarring the piling used;

and that the work will have to be done

> in spite of all difficulties including risk of piles meeting obstructions of any kind in the course of the pile driving.

It was agreed, that the prices would be held rigidly inclusive, and would cover all contingencies that may happen, and it is obviously for that purpose that clause 37 of the specifications stipulated that

> no claim for extras would be entertained by the department on account of unforeseen difficulties in the carrying out of the works herein specified.

As I have already pointed out, it is true that the borings indicate the soil as being "sand, gravel, few stones, loose

clay, stiff and sticky clay, tough clay," but, the tenderers were requested to visit the place and make their own estimates of the facilities and difficulties attending the execution of the works, including all contingencies whatever. It is also said in the specifications, that if the suppliant did find any obstructions not shown on the plans, it is its obligation to remove them at its own cost. And in order to facilitate its task, additional information was made available as to the conditions of the soil, but one of the officers of the suppliant refused this information, stating that he had a perfect knowledge of the soil at that particular place. Then, comes clause 56 of the contract in which it is stated that the information given in the plans and the boring sheet is not "guaranteed or warranted by or on behalf of His Majesty," and a further stipulation that the contractor will make no claim against His Majesty "for loss or damage sustained or on account of unforeseen difficulties of any kind."

It has been suggested that the contract contains clauses that should be considered as inexistent, because they go beyond the authority given by the Order in Council. This particularly applies to clause 45 which declares that no implied contract

> shall arise from any position or situation of the parties at any time,

and also to that part of clause 56 which says

> that any statement, representation or information, if so made, given or furnished, was * * * merely for the general information of bidders, and not in anywise warranted or guaranteed by or on behalf of His Majesty.

This would leave the respondent free to rely on an implied contract to claim on a "quantum meruit" basis, and would considerably reduce the devastating effect of clause 56, which in a milder form is also found in the specifications.

It seems quite useless to examine if all that has been said on this matter by the Judicial Committee in *The King* v. *Vancouver Lumber Co.* (1) finds any application here, because the tender duly signed by the respondent contains a specific clause which precisely covers the point and defeats the objection:—

> Contract.—The contractor will be required to sign a contract similar to the form exhibited at the same time as the plans and specifications.

(1) (1919) 50 D.L.R. 6.

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The signing of a contract exhibited with the plans and specifications, was a condition of the tender and, therefore, all its clauses were duly authorized by the Order in Council of February the 10th and are binding upon the parties, who had a complete knowledge of its contents.

The suppliant tendered to furnish and drive these piles in a soil the nature of which it agreed to investigate, and which the appellant did not guarantee, but merely indicated with the reserves above mentioned, as being of "sand, gravel, few stones, loose clay, stiff and sticky clay, tough clay." The risk was upon the suppliant, and having assumed it, it must necessarily bear all the consequences, financial and others, if it misjudged the works to be performed and miscalculated the cost of the enterprise. Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent has the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its undisputable right to benefit, if the soil had been more favourable and easier than foreseen.

The Court is bound by the terms of the contract, which is the law of the parties. And there is also the statutory law which supports the stand taken by the Crown, and which to my mind has the effect of thoroughly destroying the suppliant's submission. The Exchequer Court of Canada, under section 18 of the *Exchequer Court Act*, has exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown. And section 48 of the same Act limits the jurisdiction of the Court, and does not allow it to grant any additional compensation. This section reads as follows:—

> 48. In adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow
>
> (*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein;

Having come to the conclusion that the works performed are covered by the contract, it seems impossible to allow any additional compensation, without doing violence to the unequivocal terms of this section.

For these reasons, the respondent cannot succeed; but even if the claim of the respondent were not covered by the contract, it would still fail, for it would have to be founded on an implied contract; and, on this point it is unnecessary to discuss the case of *Nova Scotia Construction* v. *The Quebec Streams Commission* (1) in view of the clear declaration of the parties in the agreement,

> that no implied contract of any kind whatsoever, by or on behalf of His Majesty, shall arise or be implied from anything in this contract contained.

It follows that the appeal should be allowed, the petition of right dismissed as well as the cross-appeal, with costs throughout in both issues.

Appeal allowed and cross-appeal dismissed with costs.

Solicitor for the appellant: *Valmore Bienvenue.*

Solicitors for the respondent: *Vien, Faribault & Trudeau.*