1932
*Nov. 14, 15, 16, 17.
1933
*Feb. 7.

THE NOVA SCOTIA CONSTRUCTION COMPANY LIMITED (PLAINTIFF).. APPELLANT;

AND

THE QUEBEC STREAMS COMMISSION (DEFENDANT) ..... RESPONDENT.

AND

THE ROYAL BANK OF CANADA (MISE-EN-CAUSE).

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

Contract—Building of dam—Tender—Fixed price—Additions or deductions to be at the rates of the tender—Extras—Quantum meruit—False representations—Contract not void, but voidable.

A party to a contract, as soon as he has knowledge of any fraud or false representations, must decide at once either to continue to carry out

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

the contract or take immediate steps to repudiate it. If he continues to carry out the contract, he cannot later, on the ground of such fraud or false representations, ask for payment on a basis different from that provided for in the contract or on *quantum meruit* or as damages arising from the fraud or misrepresentations. *United Shoe Machinery Co.* v. *Brunet* ([1909] A.C. 330) followed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Sévigny J., and maintaining the appellant's action in part.

The respondent, The Quebec Streams Commission, is an instrumentality of the Crown in the right of the province of Quebec and has been incorporated to build improvements in the rivers and streams of the province; and, under statutory provisions, it was authorized to erect certain structures designed to raise the high water level of Lake Kenogami to a certain height and to regulate and control the discharge of the lake at its outlet. The respondent called for tenders, after preparing plans and specifications. The appellant put in a tender much lower than the other offers received by the Commission which had estimated the cost at $1,324,513, its tender being for $880,682, a difference of more than $225,000 between it and the lowest of the other tenders submitted which had been prepared on the same estimates and quantities. The Chief Engineer of the Commission warned the appellant that he considered their price too low and that he did not feel that the Commission should accept their tender. However the appellant insisted to do the work and signed a contract by which it agreed to do the work embraced by its tender and contract for the sum of $880,682 and to proceed at such rate of progress as to enable the waters of Lake Kenogami to be raised to elevation 108 on April 1st, 1924, for the further sum of $105,000, making a total of $985,682, and further agreed that all *subsequent additions to or deductions from the quantities indicated in the said form of tender should be figured at the rates appearing in its said tender.* The trial judge found that the Commission paid upon the progress estimates the sum of $1,176,994.84, and that it also paid $351,451.59 of which it advanced $168,992.34, guaranteed by plaintiff's deposit of $150,000, or $18,992.34 more than the deposit. The appellant, however, was not satisfied with the payments made and sued to recover either as extras

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under the contract, or as damages arising from misrepresentations, or on the basis of *quantum meruit*, an additional sum which had been transferred to the mise-en-cause, The Royal Bank of Canada, of $442,600.60. The trial judge granted, on different heads, a total sum of $30,756.91. As the Commission should be credited with the sum of $18,992.34 which it advanced to appellant in excess of $150,000, it left to the credit of appellant a sum of $11,764.57, for which judgment was given by the trial judge. That judgment was affirmed by the appellate court.

L. A. Forsyth K.C., O. L. Boulanger K.C. and *H. Hansard* for the appellant.

Chs. Lanctot K.C. and *Louis St.-Laurent K.C.* for the respondent.

The judgment of Rinfret, Cannon and Crocket JJ. was delivered by Cannon J., and the judgment of Lamont and Smith JJ. was delivered by Smith J.—The Court was unanimous in dismissing the appeal with costs.

Mr. Justice Cannon, after stating the facts as concisely as possible (the case being printed in seventeen volumes), added the following remarks:

CANNON J.—* * * Can a *quantum meruit* be recovered in this case?

The contract would first have to be set aside either by mutual consent of the parties or by a judgment. Arts. 1022 (3) and 1138 C.C. The works have been executed and the case of *United Shoe Machinery* v. *Brunet* (1) is authority to the effect that, even in case of false and fraudulent representations, a contract is not void, but merely voidable at the election of the person defrauded, after he has had notice of the fraud.

Unless and until he makes his election, and by word or act repudiates the contract or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all.

In the present case, the appellant asked for an extension of time, as provided in the contract, to complete the works, which was granted; but never at any time did elect to have

(1) [1909] A.C. 330, at 339.

the contract cancelled for the error alleged in the declaration, and the action itself does not pray for such cancellation by the Court. On the contrary, appellant elected to treat the contract as subsisting, claiming that it executed it in its entirety and cannot and does not now asked to avoid it. Art. 1000 C.C. Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.

* * *

Moreover, in this case, clause 37 protects the respondent completely and binds the appellant to suffer the consequences of any miscalculation or misinformation *bona fide* contained in the call for tenders or plans. We have here a "marché sur devis" defined as follows by Planiol and Ripert, "Traité de droit civil français," 1932, tome XI, p. 163, no. 917:

> 917. Suite. Marché sur devis.—Au lieu de fixer définitivement par avance la somme globale à payer, les parties peuvent se contenter de simples prévisions, basées sur le coût d'exécution des divers détails. L'entrepreneur présente ces prévisions dans un écrit appelé devis, et le marché est dit "marché sur devis." Le prix total dépendra le l'ensemble des travaux accomplis conformément au devis. Il peut donc varier par l'addition de détails nouveaux, de travaux supplémentaires. On peut dire que dans ce cas encore il y a marché à prix fait, mais article par article, et non plus en bloc; chaque détail du travail a son prix particulier, et le total à payer ne pourra être connu qu'après exécution, suivant que tels ou tels travaux auront été faits. Il est fixé après coup, et non d'avance comme dans le forfait. Le marché sur devis concerne presque exclusivement les entreprises de travaux matériels.

If appellant had wished to protect itself and secure a possible increase in the unit price, it should have done what its witness Swan says at page 120, line 28, vol. III:

> In actual practise myself, I invariably stipulate if there is some question of depth that we do not know about and that there is likely to be a variation in the depth of the foundation, we invariably put in a clause to the effect that unit rates under the contract would be applicable down to five feet below what is shown on the plans, and anything beyond that, then you have got to take the matter into consideration and try and meet the cost and work out what is a fair and reasonable price to allow for the additional cost. That is my own personal practice and has been with my chiefs for all my career.

Nothing of the sort happened; appellant took a chance and its speculation brought it a loss. Who is to suffer for its miscalculation?

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Article 1012 C.C. enacts:

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

What I have said disposes, in my opinion, of any attempt to recover for the alleged tort, under 1053 of the Code, because the information that the appellant says it relied upon was, in its view, grossly inaccurate and misleading. *Grant* v. *The Queen* (1), under circumstances more favourable to the petitioner, was decided in favour of the Crown. It should have consulted an experienced engineer to prepare a well considered tender and understood that the honest belief and hope of the Respondent's engineer did not amount to a warranty as to plans and quantities; forsooth, it could have found that out by reading, with enough attention to understand them, the specifications and standard form of contract placed at its disposal. This case is distinguishable from *Pearson & Sons* v. *Dublin Corporation* (2), as it is impossible to find here fraudulent representations. The contract in this case stands as the law of the parties. In *Bush* v. *Whitehaven Trustees,* reported in Hudson's On Building contracts, vol. 2, p. 122, there was a finding by the jury, that the conditions of the contract were so completely changed, in consequence of the defendants' inability to hand over the sites of the work as required as to make the special provisions of the contract inapplicable. Here the contract was made with anticipation of the circumstances of which the appellant complains and provided for them; it is therefore applicable and must be applied. I refer to these English cases because they have been quoted and discussed before us and below, although this case must be, and our decision is governed by the law of Quebec.

* * *

These findings, on matters of fact, unanimously concurred in by the Court of King's Bench, cannot be disturbed by us, unless we reach the conclusion that they are clearly wrong or against the evidence. The appellant has failed to establish either of these two conditions.

Under the statute 3 Geo. V, c. 6, secs. 6 and 16, any change in the consideration or price of the contract for extra work, not covered by the terms of the contract or the

(1) (1891) 20 Can. S.C.R. 297. (2) [1907] A.C. 351.

unit price, had to be approved by the Lieutenant-Governor in Council. The engineer, even if acquiescing to any change, could not bind the Crown and change the contract. See *De Galindez* v. *The King* (1).

The province paid appellant large sums over and above the price of its tender. It is not entitled to more, unless the respondent agrees to it. We cannot, by a judgment, order a thing, which, under the contract, can be done only by mutual consent, expressed by Order in Council, according to the special statute limiting the capacity to contract of the respondent. Arts. 360-364-366 C.C. We agree with the arguments and conclusions contained in the very able and complete judgment of the learned trial judge and the clear cut exposition of the law of contracts of the province of Quebec of the ex-Chief Justice Lafontaine and we concur when he says:

> un principe primordial doit dominer tout le litige. C'est celui de la sécurité des contrats que les tribunaux ont pour mission de maintenir, et non pas de refaire pour venir en aide à un contractant malheureux.

Plaintiff can get no relief from the courts. His case might bring further adjustments by mutual consent, if the respondent agrees to reconsider the matter. On the evidence, it is impossible to differ from the conclusions unanimously arrived at by the provincial courts and the appeal must be dismissed with costs.

Mr. Justice Smith agreed with Mr. Justice Cannon that the appeal should be dismissed, being of the opinion that "in view of the provisions of the contract, there was no misrepresentation and no difference of conditions to warrant the setting aside of the contract entered into by the parties, and that the appellant must be paid for the work done according to the terms of the contract, except as varied by mutual consent."

Appeal dismissed with costs.

Solicitors for the appellant: *Boulanger, Marquis & Lessard.*

Solicitor for the respondent: *Louis St. Laurent.*

(1) (1906) Q.R. 15 K.B. 320; 39 Can. S.C.R. 693.