CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

DUSSAULT AND PAGEAU (PLAINTIFFS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (DEFENDANT) ..... } RESPONDENT.

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*Nov. 6.
*Nov. 28.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Default—Completion at a saving—Security—Recovery.

A contractor, who abandons the execution of his contract, which is completed at a saving, cannot claim the difference between his contract price and the final cost of the works.

When a separate contract stipulates that money deposited by the contractor as security should be returned upon the full performance of the works or, in case of the contractor's default, might be employed for its completion, such money must nevertheless be paid back to the defaulting contractor if the work is completed under a second contract for a less sum than the original contract price. Fitzpatrick C.J. dissenting.

Per Fitzpatrick C.J. (dissenting):—As the respondent has paid for the completion of the contract a larger sum than the amount of the security, the appellant is not entitled to its recovery.

Judgment of the Exchequer Court of Canada (16 Ex. C.R. 228; 39 D.L.R. 76), affirmed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from the decision of the Exchequer Court of Canada (1), maintaining in part the petition of right of the plaintiffs.

The material facts of the case are fully stated in the judgments now reported.

Belleau K.C. and *Marchand K.C.* for the appellants.
Drouin K.C. for the respondent.

THE CHIEF JUSTICE (dissenting on the cross-appeal)—The pleadings in a case are meant to bring out clearly the issues presented for the decision of the court. It would be very difficult to gather these from the petition of right in this case and we need not try because the appellants' counsel in their factum say:—

> At the trial many of the allegations of the petitions of right were abandoned and on behalf of the appellants we submitted that they were entitled to recover a sum of $5,168.41 for the following reasons;

They proceed to set out certain amounts and values which they allege the respondent received from them and which, after deducting certain credits, leave a balance of the mentioned sum.

It is necessary to set out briefly the facts of the case in order to see what is really the claim now advanced.

The appellants entered into a contract with the respondent for the construction of a wharf for the sum of $33,775, and they deposited security to the amount of $3,600. Before the wharf was nearly complete, the appellants, in breach of their contract, as found at the trial, abandoned the works which were thereafter completed by another contractor, one O. Poliquin. When the appellants threw up their contract they had received from the respondent the sum of $15,300, the total payments made to them on account, and they

(1) 16 Ex. C.R. 228; 39 D.L.R. 76.

left on the premises materials to the value of $10,183.30. These, however, to the value of $4,949.89 were unpaid for and the respondent subsequently paid this amount, the value of the appellants' materials which the respondent took over under the terms of the contract being thus only $5,233.41.

The contract between Poliquin and the respondent provided that the contractor should take over and utilise in the completion of the wharf all the materials on the site at the valuation of $10,183.30, this being set-off against the total price payable of $22,490. It may be noted that this sum of $22,490 included a small extra of $350.

It thus appears that the total cost of the bridge, not including the $350 extra, was:—

Cash paid appellants		$15,300.00
Value of material handed over to Poliquin and put into the bridge	$10,183.30	
Cash paid Poliquin	11,956.70	22,140.00
Total		$37,440.00
The original contract price was		33,775.00
An excess of		$3,665.00

The appellants admit their liability for this excess but claim to set against it

The value of their materials taken over by the respondents	$5,233.41	
Their deposit	3,600.00	$8,833.41
Deduct the above excess		3,665.00
leaving a balance, which is the amount of their claim, of		$5,168.41

The Assistant Judge of the Exchequer Court has held that under the contract the appellants are not

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entitled to recover any part of the value of their materials, but inasmuch as such value exceeded the excess cost to the respondent over the original contract price they are entitled to recover their deposit.

The appellants, therefore, are appealing for the difference between the above sum of.... $5,168.41
and the deposit allowed them..... 3,600.00

That is..... $1,568.41

The respondent cross-appeals against the judgment to return the deposit.

The fallacy underlying the claim and partly adopted in the judgment appealed from consists in treating the case as if it were an action by the respondent for breach of the contract. The case is, however, quite different and the question of damage sustained does not enter into it at all. In an action for breach of contract the plaintiff must, of course, prove his damages and cannot recover if it is shewn that he has sustained none. It is, however, useless for the appellants to shew that the respondent suffered no damage, unless they can shew that this fact gives them a claim on the respondent. This is not done and the appellants can only claim, if at all, under the terms of the contract. They can only succeed if they are able to prove a claim regardless of whether or not the respondent suffered any loss by the breach of the contract. This appears to have occurred to the learned judge but he has not borne it clearly in mind, because he refuses the claim as regards the materials on the ground that the contract provides as

security to the building owner, for the performance of the works,

that all the materials provided by the contractor shall be the property of the Crown if the builder fails to complete his works, but he allows, though

not without some hesitation,

the claim for the deposit made as security, although the contract provides that

if the said contractor should make default under the said contract His Majesty may dispose of said security for the carrying out of the construction and completion of the work of the contract.

Under this provision the appellants might be entitled to recover any part of the deposit which the Crown had not paid for the completion of the work. If, for instance, the Crown had only paid $3,000 for such completion, the appellants might be entitled to recover $600, the balance not so employed. Here, however, the Crown has paid $16,906.39 for the completion of the work and must be entitled, under the terms of the contract, to utilise the deposit towards payment of this sum.

A possible view would perhaps be that the materials having become the property of the Crown the appellants cannot claim any credit in respect of them and that consequently they are liable, as the assistant judge suggests they might be, for the excess cost over the contract price, that is $3,665, an amount exceeding the deposit, which is only $3,600. As to this, however, I express no opinion. It is sufficient to say that the appellants, having proved no claim against the Crown, the appeal should be dismissed and the cross-appeal allowed with costs. But the majority are of a different opinion.

DAVIES J.—The appellants were contractors with the Crown for the construction of a pier or wharf under written contract. After they had entered upon their contract work, and partly performed it, they, as found by Audette J,

threw up their contract and abandoned its completion.

The Crown thereupon entered into another contract with other parties for the completion of the work

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and it was completed by these other contractors. The cost to the Crown was somewhat less than the suppliants (appellants) — the original contractors — had agreed to complete the work for and the first claim made by them in this petition of right is that, although they had abandoned their contract work and left it unfinished, nevertheless, as the Crown was enabled through other contractors to finish the work for a less sum than the appellants had originally contracted to complete and finish it for, they were entitled to recover the difference or saving to the Crown between their tender price and the actual cost of the work.

The learned judge found as a fact that this apparent saving to the Crown amounted to $1,568.41, but he very properly and rightly, in my opinion, dismissed this claim of the defaulting contractors as one which could not be allowed.

A second claim made by the appellants was with respect to the sum of $3,600 delivered by them to His Majesty on their entering into their contract as security for its "due performance." Their contention was that this $3,600 had been deposited by them merely as security for the performance of their contract and had not

been disposed of by the Crown in carrying out the contract work

after the work had been abandoned by them but was still in the Crown's hands, and that the work having been completed for a less sum than their contract provided for, and no evidence whatever having been given of any part of the deposit having been disposed of in carrying out the contract, they were entitled to its return.

The contract between the appellants and the Crown with reference to this $3,600 deposit was a

separate one from the contract for the carrying out of the work contracted for, and the respective rights of the appellants and the Crown must be determined by the terms of this subsidiary contract.

It stated in its first clause that

> the said security ($3,600) had been delivered to His Majesty and was to be held by him as such for the due performance and fulfilment by the contractors of the said contract.

After providing in its third clause that the contractors

> should be entitled to receive back the value of said security with interest upon the full performance and fulfilment of the said contract,

it went on in its fourth clause to provide for the contingency of their defaulting under the contract.

In that event it provided that

> His Majesty may dispose of said security and of the interest for the carrying out of the construction and completion of the work of the contract and for paying any salary or wages that may be left unpaid by the said contractors.

Nothing whatever is said in this subsidiary contract as to a forfeiture of this $3,600. It provides for the two contingencies of completion and non-completion of the contract by the contractors. In the former case it provides for the return of the security moneys to the contractors and in the latter for the right of His Majesty to dispose of the security moneys in carrying out the contract which the contractors had failed to do.

The $3,600 was, therefore, a mere security for the performance of the contract. If the contract had been duly performed the money would, of course, have been repaid to the contractors. If, as the fact was, the contractors defaulted, the Crown might have

> disposed of the security in carrying the contract out.

But, as the result proved, they were not called upon so to dispose of it because the work was completed

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under the new contract entered into by the Crown for a less sum than the appellants had originally contracted to complete it for.

The Crown gave no evidence whatever that any such disposition of the $3,600 security as the subsidiary contract provided for had been resorted to.

The facts shew that no such disposition became necessary and the security moneys now remain in the Crown's hands.

Under these circumstances, it seems to me the learned judge's disposition of this branch of the claim declaring the suppliants to be entitled to a return of this $3,600 security was also right. I think, however, that whatever interest that sum has earned in the hands of the Crown up to the date of the demand and thereafter at the rate of 5% should also be allowed, the amount to be settled by the registrar.

I would, therefore, dismiss the appeal of the suppliants without costs and the cross-appeal of the Crown with costs.

IDINGTON J.—The appellants contracted with the respondent to execute a work for $33,775 and were paid directly $15,300, and indirectly $4,949.89, making a total of $20,249.89. They abandoned their contract which meant by the terms thereof the abandonment of material on the ground as well as in the work.

The respondent re-let the work, transferring all such material on the ground, estimated to be worth $10,183.30, to the contractor who had tendered to complete the work, including an extra of $350, for $22,490, and thereby became only entitled to get a balance of $11,956.70 in cash applicable to the appellants' contract price when due credit was given for said extra and for said material. Respondent paid that balance

of cash in addition to the cash paid to and for the appellants as above set forth; and as I read the story had thus $1,568.41 left to meet the incidental expenses caused by the default of appellants.

I fail to see any alleged profit therein. I surmise it would probably, on examination, be needed to cover immediate expenses and possibly a year's interest on the advance caused by appellants' many delays.

Moreover, it cannot be recovered in face of the express terms of the contract.

Hence I think the appeal should be dismissed save as to the items of interest on the security deposit as hereinafter mentioned. But I think there should be no costs of the appeal.

The cross-appeal arises out of and depends upon another contract, though of same date as that I have disposed of and by the express terms thereof presumably executed after that other and is itself a distinct contract or suretyship for the due performance thereof.

This contract must be construed by its own express terms and the necessary implications therein having due regard to its obvious purpose.

The cross-appellant having entered into a contract letting to cross-respondents certain work to be constructed by them for him, it became important to ensure the due execution of the work received from them for that purpose certain securities and moneys, valued in the whole at the sum of $3,600.

The agreement, in its operative part, declared first that the said security had been delivered to the cross-appellant to be held by him for the due performance and fulfilment by cross-respondents of the said contract and of all the covenants, agreements, provisions and conditions therein mentioned, by them to be performed and fulfilled; next that His Majesty was

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not to be held responsible for the payment of interest on the security so deposited; and then upon the full performance and fulfilment by cross-respondents of the said contract, and of all the covenants, agreements, provisions and conditions as aforesaid, the cross-respondents should be entitled to receive back the value of said security together with the interest, if any, which might have accrued out of the deposit whilst in the hands of the Finance Department.

Such is the tenor of the agreement followed by a provision that the cross-respondents assumed the risk of loss of the security through insolvency of any bank on which any cheque had been drawn or in which any deposit had been made in connection with the security.

Then follows clause 4 of the agreement which is as follows:—

> 4. But if at any time the said contractors should make default under the said contract, or if His Majesty acting under the powers reserved in the said contract, shall determine that the said works, or any portion thereof remaining to be done, should be taken out of the hands of the contractors, and be completed in any other manner or way whatsoever than by the contractors, His Majesty may dispose of said security and of the interest which may have accrued thereon for the carrying out of the construction and completion of the work of the contract and for paying any salaries and wages that may be left unpaid by the said contractors.

It is upon the construction of this clause, when read in light of the entire scope and purpose of the agreement, that the claim of the cross-respondents which has been allowed by the learned trial judge below must rest.

The contract for which the deposit was made by way of surety for its performance was, after a great part of the work had been performed, abandoned by cross-respondents and thereupon the cross-appellant, as entitled by the terms of the contract, took possession thereof and of the material on the ground and re-let the

execution of the work to another contractor who finished same at less expense than the balance of the original contract price when due credit was given for the material abandoned by the cross-respondents and taken over by the cross-appellant.

No part of the security was ever needed to be resorted to, or was in fact resorted to, for the carrying out of the construction and completion of the work to be done under the contract, or for paying any salaries and wages left unpaid by the said contractors.

It is only by an unjustifiable confusion of two entirely separate contracts and juggling of two sets of figures that have really nothing to do with each other that the semblance of argument is made in support of the cross-appeal.

So far has this been carried that the cross-appellant's factum presents one statement alleging the second contractor had been paid by cross-appellant $17,256.59, when in truth he was only paid $12,306.70.

The difference was made up by use of the material the cross-respondents had abandoned, and which the second contractor was bound to use and make allowance for.

The specifications in the original contract, if the parties had chosen to abide thereby, might require consideration but they are not incorporated with this suretyship contract, or referred to therein, and as I view it have nothing to do with it.

It might well have been, as sometimes happens, that a third party, such as a guarantee company, might have given its bond expressed in substance with conditions such as set out in this second agreement for the like purpose.

What would have been said had the Crown sought

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to recover under the circumstances existent here upon such a bond?

I need not pursue the matter further except to say that on the facts I think the security is only the property of a subject, detained by the respondent, when it ought to have been returned the moment that events had so developed that the work was complete and that without loss to the Crown.

And I observe that the judgment fails to give interest which, I think, ought to be added from the date when the security should have been returned.

Any interest earned by the deposit whilst rightfully in respondent's hands should also be allowed.

If the parties cannot agree as to the date when the deposit was returnable the matter should go back to the learned trial judge to fix it. That can be done if not by virtue of this cross-appeal then by virtue of the main appeal.

The cross-appeal should be dismissed with costs.

DUFF J.—I am of the opinion that the appeal and the cross-appeal should be dismissed with costs.

ANGLIN J.—I concur with my brother Davies J.

Appeal dismissed without costs; cross-appeal dismissed with costs.

Solicitors for the appellants: *Belleau, Baillargeon & Belleau.*

Solicitors for the respondent: *Drouin & Amyot.*