15 pages

ROYAL COURT
(Samedi Division)
19th APRIL, 1991.
Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat the Hon. J. A. G. Coutanche
Jurat C. L. Gruchy

54.

Between: **Nigel Donnelly** **Plaintiff**

And: **Randalls Vautier Limited** **Defendant**

Advocate P. C. Sinel for Plaintiff
Advocate J. G. P. Wheeler for Defendant

On the 8th June, 1990, the plaintiff sued the defendant for £1,550, costs and interest, in respect of an account rendered. The defendant appeared and the action was placed on the 'pending list'. Consequently, the plaintiff, a self-employed builder and stonemason, filed a statement of claim alleging that in or about February, 1989, the parties contracted together for the construction by the plaintiff of four pétanque pitches (in fact the work comprised the formation of a car-park and four pétanque pitches) to the rear of the Carrefour Selous Public House, St. Lawrence, in accordance with drawings provided by the defendant; that the plaintiff's original quotation for the works first requested by the plaintiff was £6,000; that as the plaintiff progressed with the works, various alterations and additional works became necessary as a result of (a) additional items and works requested by the defendant (b) errors in the original plans supplied by the defendant, and (c) additional works made necessary by reason of the high water table in the area in question; that the defendant was informed of the necessity for additional works in respect of the high water table and that additional charges would be levied; that the defendant told the plaintiff to provide the extra works; that on or about the 27th April, 1989, the plaintiff sent an invoice in the sum of £8,850 to the defendant, of which £7,300 has been paid; and that the sum of £1,550 remains unpaid.

The defendant filed an Answer in which it admits that certain drawings were provided, but not as the basis of the contract. The defendant avers that the quotation was a fixed price quotation for the works requested by the defendant; that the plaintiff was requested to confirm the amount of his quotation and when he did so it was made clear to the plaintiff that his quotation was a fixed price quotation and that he would receive no extra payment, except for any additional works specifically requested by the defendant. The defendant admits that additional works became necessary as a result of requests made by it; the agreed cost of such works, amounting to £1,300, has been paid by the defendant; the defendant denies that additional works became necessary because of errors in the original plans or at all. The defendant pleads that if, which is not admitted, additional works were necessary by reason of the high water table in the area, such works were the responsibility of the plaintiff and that the defendant neither agreed to pay, nor is responsible for the payment of, any such additional works. The defendant admits that it was informed of the necessity for additional works but alleges that on being so informed the defendant advised the plaintiff that no additional payment would be made because it was a fixed price contract and such works were the responsibility of the plaintiff; and that thereupon the ~~defendant~~ plaintiff carried out the extra works.

Subsequently, the plaintiff filed a Reply in which he admits that an initial quotation of £6,000 was given by him but denies that this was a price which included the extras now claimed by him. The plaintiff alleges that the defendant told him that the plan and specifications provided were not 100% accurate and that amendments were later made necessary as a result of inaccuracies in the plan and specifications. The plaintiff avers that it was an implied term of the original contract (implied by trade usage) that he would receive payments in respect of any extra works done as a result of unforeseen circumstances in general and in particular as a result of an abnormally high water table; and that the defendant was informed of the necessity for extra works and agreed that it would have to pay for them. The plaintiff further alleges that he was informed by the defendant that he would be paid a part of the extra monies forming part of his claim; that he agreed at that time to accept £750 in

settlemen £ made immediately; that settlement has not been made and the plaintiff is entitled to claim the full quantum of the claim and relies on the offer of £750 as proof of liability; and that at or about Christmas, 1989, at a meeting between the plaintiff and a representative of the defendant, the plaintiff was informed that his claim would be paid in full.

In the further and better particulars of his statement of claim the plaintiff states that the plans supplied by the defendant were inadequate and that insufficient and inaccurate details were given in general and in particular in relation to the high water table in the area, of which no mention whatsoever was made. The plaintiff claims that the additional works had to be carried out as a direct result of the omissions in the defendant's plans. The single plan was prepared by Messrs. Roger Norman design consultants. No representative of that firm has given evidence. The drawing appears to provide nothing more than layout and dimensions. There was no specification and no bill of quantities, but Mr. Ian King of the tied trade department of the defendant made available to the plaintiff an extract of a journal of the pétanque society containing a specification for pétanque pitches.

The Court is satisfied that the complaint of omissions in the defendant's plans does not assist the plaintiff. We refer to Hudson's Building and Engineering Contracts, 10th Edition, page 50:-

> " ..... the courts will not imply terms merely to make the contract more reasonable in its consequences. They will only imply a term if, without it, the contract would be commercially unworkable."

And at page 51:-

> "On the other hand, where (as almost invariably is the case) the contract is an entire contract in the legal sense, so that the contractor not only undertakes to carry out but also to complete the work in accordance with the employer's designs or specification, there is no room for any implied

undertaking by the employer that completion in accordance with the design or specification is possible or practicable. Accordingly the contractor will have to pay damages if he cannot complete, or will be unable to recover extra payment for additional work necessary to achieve completion".

At page 200, the learned author, dealing with contracts using drawings and a specification only, says that:-

" ..... if there was, by inadvertence or otherwise, a failure to show all the necessary work in precise terms in the documents, the contractor was nevertheless bound to do the whole of the necessary work for the agreed contract price. In such a case the specification and drawings were regarded as a minimum, and not a final and definitive statement of the work undertaken for the contract price. Smaller less formal jobbing contracts frequently fall into this category at the present day."

And, at page 264, under the heading "Indispensably necessary work expressly or impliedly included", the learned author says that:-

" ..... in the absence of an expressed contrary intention, an obligation to do described work imports an obligation to do all the necessary ancillary work or processes, whether described or not, which are needed to produce the described work."

At page 265 et seq. the learned author gives illustrations of the application of the principle. It is unnecessary for us to cite them in detail. They are Weatherstone v. Robertson (1852) I. Stuart Milne & Peddie (Sc) 333; Williams v. Fitzmaurice (1858) 3 H. + N. 844; and Re Walton-on-the-Naze U.D.C. and Moran (1905) Hudson's B.C. 4th ed. Vol.2, p.376.

At page 268 the learned author says that:-

' ..... any additional work necessary to achieve completion must be carried out by him at his own expense if he is to discharge his liability under the contract."

Again the learned author provides illustrations at page 269 et seq. In Tharsis Sulphur & Copper Co. -v- McElroy & Sons (1878) 3 App. Cases 1040, Lord Blackburn said:

"When, as in this case, the contractors say 'We cannot do the work as we have promised to do it unless you permit us to make it thicker than we undertook to make it' and the engineer, on behalf of the company says 'I will not object to your making it thicker if you cannot do it otherwise'. I think there is nothing in that to imply that there was to be payment for that additional thickness."

Other cases there cited include Thorn v. London Corporation (1876) 1 App. Cases 120 (re. use of caissons for the re-building of a bridge); Jackson v. Eastbourne Local Board (1886) Hudson's B.C. 4th ed. Vol.2 p.81 (re. provision of groynes to protect a sea-wall); and Re. Nuttall and Lynton and Barnstable Ry. (1899) Hudson's B.C. 4th ed. Vol.2 p.279, 82 L.T. 17 (re. additional quantity of excavation in "earthworks" connected with building a railway).

In our judgment, therefore, the plaintiff fails in his claim insofar as it is based on alleged omissions in the defendant's plan or drawing.

Moreover, the plaintiff has failed to satisfy us, the burden of proof being on him, that there exists any trade usage which implies a term to the contract that the plaintiff would receive payment in respect of any extra work done as a result of unforeseen circumstances.

Hudson's Building and Engineering Contracts (supra) at pages 52 and 53, says that:-

"It is possible for trade customs, more correctly in law called trade usages, to form part of the terms of a contract, although not expressly incorporated in a written or oral agreement of the parties. The incorporation of trade usages is, however, subject to certain principles of law which render such incorporation rarer than laymen engaged in the trade frequently suppose or would wish".

We have no doubt that the plaintiff, a "layman engaged in the trade", wishes that there did exist a trade usage to form part of the terms of the contract in the instant case. But he is unable to produce any authority to support his claim.

Hudson sets out four principles or conditions which a usage must satisfy in order to be a valid trade usage:-

"First, it must be notorious, that is to say, so well known in the trade that persons who make contracts of a kind to be effected by such must be taken to have intended that such usage should form part of their contracts. Notoriety is a matter of evidence.

"Secondly, the usage must be certain: it must have the same degree of certainty as any other contractual term. The issue of certainty is an issue of law .....

"Thirdly, the usage must be reasonable: what is reasonable is a question of law .....

"Fourthly, the usage must not be contrary to law: a usage which sanctioned conduct which was illegal would be void."

In our judgment the plaintiff fails at the first hurdle because he adduced no evidence at all of a trade usage and it is unnecessary for us to go on to consider the second and third (clearly the plaintiff would satisfy the fourth test). If the plaintiff were correct then there could be no "fixed price" or "lump sum" contracts. But it is notorious, and the plaintiff admitted, that persons do make

"fixed price" or "lump sum" contracts where the contractor cannot claim payment for work which is necessary but additional to that described in the contract documents, the authorities relating to which we now go on to review.

In Sharpe v. San Paulo Railway Company (1873) L.R. 8 CH. App. the engineer of a railway company prepared a specification of the works on a proposed railway and certain contractors fixed prices to the several items in the specification and offered to construct the railway for the sum total of the prices affixed to the items. The Court of Appeal held that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground. This too was a case where during the progress of the works it became apparent that the actual quantities of earthwork being done by the contractors were greatly in excess of the quantities specified.

At page 607, Sir W. M. James, L.J. says this:-

> "I think that the decision of the Master of the Rolls is perfectly unquestionable upon any principles of equity. In this case the contractors undertook to make the railway .... and they undertook to do it for a lump sum ..... The first contract was that the line should be completed for a fixed sum. But the plaintiffs say they are, upon several heads, entitled to a great deal more than that sum. The first head is that the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of. They were to judge for themselves."

Halsbury's Laws of England, 4th Edn, Vol.4, page 601, para. 1175 says that:-

"Generally work which is indispensable for the completion of the building or works falls within the contract, notwithstanding that it is not specifically mentioned in the contract documents. It is immaterial that extra work arises because of an impractical design. Where the contractor has tendered on bills of quantities which do not form part of the contract, the contractor cannot claim payment for work which is necessary but additional to that described in the bills ..... In a lump sum contract, the contractor will not be entitled to an increase to the contract sum in respect of the unpriced work ....."

John Uff Construction Law 4th Edn., at pps. 128 and 129, deals with contractual variations thus:-

"It is pertinent to state first what is not a contractual variation. Contractors sometimes make claims on the basis that a contract work has cost more than was anticipated. This is not a variation and the contractor is entitled to no extra payment unless he can make a claim under the contract, such as for unforeseen conditions (see ICE form, clause 12). When the contractor has undertaken to carry out and complete the work for a stated price he is bound to do so, however expensive it may prove to be. Thus, where a contractor undertook to build sewerage works in unknown ground which turned out to be marshy, he abandoned the works when the engineer refused to authorise additional payment. It was held that since there was no express warranty as to the nature of the site, the contractor was not entitled to additional payment: Bottoms v. Mayor of York (1982)."

At p.129, the learned author deals with "The Contract Work":-

"Extra work for which the contractor is prima facie entitled to be paid must constitute something additional to what has been contracted for. ..... Broadly speaking, the shorter and simpler the description of the work to be carried out, the more difficult it will be for the contractor to

ntend that work is extra ..... where the contractor is not given additional instructions, and the work is within the contract description, there will be no right to extra payment."

At p.131 the learned author deals with "Payment for extras":-

"If the contractor carries out work which is extra to the contract, he will be able to recover payment for that work only if he can show that the employer is bound under contract to pay. The mere doing of extra work, or doing work in a way different from that specified, does not, without more, bind the employer to pay for extras."

Thus, it is clear from the authorities that if the contract between the plaintiff and the defendant was a "fixed sum" contract, with a provision for such variations only as were expressly approved by the defendant in advance, then the plaintiff cannot claim payment for work associated with the high water table in the area, albeit necessary but additional to that shown on the drawing and agreed to be completed by the plaintiff. If the work in connection with the high water table was insufficiently shown on the drawing provided, that is precisely the thing which the plaintiff took the chance of. He had to judge for himself.

If the plaintiff undertook to construct the car park and four pétanque pitches as shown on the drawing for a fixed price of £6,000 and the work done in connection with the high water table was indispensable to the completion of the works, then it is immaterial whether or not the extra work arose from an impractical design, because the plaintiff cannot claim payment for the extra work.

The Court, although it is entitled to rely heavily upon English authorities, particularly in this kind of case, must always have regard, first and foremost, to Jersey law and it is disappointing to note that neither Counsel has deemed it appropriate to cite Jersey authority.

The solution to the instant case is surely t s found in the ancient maxim of Jersey customary law "la convention fait la loi des parties". The maxim undoubtedly enunciates an important principle of law (Macready v. Amy (1959) J.J. 11).

In Granite Products Ltd. v. Renault (1961) J.J. 163 at p.168:-

> "Counsel for the defendant admitted that, had his client entered the employment of the Company initially on the terms of the 'Flat and Wages agreement', he would have had no case on the principle that "La convention fait la loi des parties"." The court went on: "We think that that must have been so because there is nothing to suggest that the agreements were anything other than they purported to be."

In Wallis v. Taylor (1965) J.J. 455 at p.457 the Court said that:-

> "It is an established principle of Jersey law that "la convention fait la loi des parties" and the Court will enforce agreements provided that, in the words of Pothier, (Oeuvres de Pothier, Traité des Obligations, 1821 edition, at p.91) "elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capables de contracter". Where an agreement is freely entered into between responsible persons, good cause must be shown why it should not be enforced ....."

The maxim was further discussed in Basden Hotels Limited v. Dormy Hotels Limited (1968) J.J. 911, at p.919:-

> "But we cannot leave this matter without referring to another maxim. It is the often quoted maxim "La convention fait la loi des parties." Like all maxims it is subject to exceptions, but what it amounts to is that courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is a good reason in law, which

cludes the grounds of public policy, for them to be set aside."

In the instant case it may be, if we find that the contract between the parties was a "fixed price" contract and that, therefore, the plaintiff is not entitled to recover any more than the contract sum, that the defendant will have obtained a car-park and four pétanque pitches at less than their true cost. On the other hand, the plaintiff was one of three to tender for the work and his original quotation was by far the lowest of the three and his revised quotation remained substantially the lowest of the three. It would be wrong to allow a contractor to quote for a "fixed price" contract at an artificially low price and thus to win the contract as against his competitors and then to charge extra by way of additional works in order to complete the original contract. Thus, in our judgment it is right for us strictly to enforce the maxim "la convention fait la loi des parties" subject, of course, to ascertaining on the evidence exactly what the "convention" was.

Our view is strengthened by the fact that the maxim was applied in the case of a building contract in Grimshaw v. Ruellan (1976) J.J. 299 where the Court had to decide whether a final certificate issued by the architect under a R.I.B.A. contract was conclusive. At p.307 the Court asked itself the question:-

> "Is the Certificate conclusive in this Court upon the strong persuasive authority of the House of Lords in East Ham Borough Council v. Bernard Sunley & Sons 3 All E.R. 619? And are we precluded from, so to speak, looking behind the certificate, in the special circumstances of this case?"

The Court went on to consider the maxim and cited both Wallis v. Taylor (supra) and Basden Hotels Limited v. Dormy Hotels Limited (supra). The Court then said:

> "We have considered whether the facts of this case can be brought within any of the exceptions referred to in the above

judgments. We have come to the conc? ion, albeit reluctantly, that they cannot".

The next questions to be answered, therefore, are questions of fact. Was this a "fixed price" contract subject only to such variations as were specifically approved by the defendant? Or is the plaintiff entitled to claim for the additional works made necessary by reason of the high water table because the defendant, through its duly authorised officer, agreed that the work should be done at the expense of the defendant?

The burden of proof is upon the plaintiff and the standard of proof is the balance of probabilities. Thus, the plaintiff, if he is to succeed in his action, must satisfy the Court, on the balance of probabilities, that (a) he brought to the defendant's notice that additional works had been made necessary by reason of the high water table; (b) he brought to the defendant's notice that he intended to charge for these additional works as "extras"; and (c) that the defendant instructed the plaintiff to proceed with the additional works at its expense.

In our judgment the plaintiff has failed to discharge that burden. The evidence of the plaintiff and that of Mr. King, is totally contradictory, the one of the other, in vital aspects of the case. The evidence of Mr. Ian Smith, the defendant's "tied trade manager", is largely irrelevant as hearsay, with the exception that he denies the allegation, contained for the first time in the plaintiff's Reply, that at or about Christmas 1989 he informed the plaintiff that his claim would be met by the defendant. If the plaintiff intended to sue on an admission of liability the alleged admission should have been pleaded in the plaintiff's Statement of Claim. The plaintiff has failed to satisfy us that there was both or either an unequivocal and open offer of settlement of £750 and/or an unequivocal admission of liability to the whole of the plaintiff's claim.

We consider that the plaintiff's letter of the 27th April, 1989, to Mr. King, enclosing his final account, is significant. The plaintiff had broken down his account into three parts, namely the

origina stimate or quotation of £6,000; agreed extras of £1,300; and extras claimed to arise from the high water table and consequent instability of the ground in the sum of £1,550. With regard to the third part of the account the plaintiff wrote as follows:-

"With regard to item (iii) above, these extras were necessary to ensure the job was completed satisfactorily and safely and to a good standard. As you know, following discussions and visits to site, initial excavation of the car park revealed an unusually high water table throughout causing instability in certain areas. This necessitated additional excavation and the placement of concrete floats beneath the car park surface. Considerable extra packing out with hard core was also required to ensure adequate stability on the surface.

"I am sure you will appreciate that these problems were totally unforeseen nor could they have been foreseen from the information available to me upon which I based my original estimate. I therefore respectfully request that you give the matter your fullest consideration.

"Items (i) and (ii) totalling £7,300 have already been agreed between us and I would be grateful for your early remittance. Please do not let prolonged consideration of the extras under item (iii) hold up payment of items (i) and (ii)".

On the 28th October, 1989, the plaintiff wrote again to Mr. King:-

"I confirm receipt of £7,300 covering items (i) and (ii) on the invoice and would be grateful for settlement of item (iii) in the sum of £1,550.

"I assume that not having heard from you to the contrary, the items and costs detailed in item (iii) are acceptable and I would be grateful for your early settlement".

Those letters, in particular the earli one, are not consistent with the claim, in the plaintiff's Reply, that the defendant, upon being informed of the necessity for extra works agreed that it would have to pay for them. We believe that the letters reveal the true situation between the parties i.e. that the defendant was liable to pay £6,000 and £1,300; that the defendant had no legal liability to pay £1,550; and that the plaintiff hoped that the defendant would recognize that he had incurred additional costs by carrying out extra work which was indispensable for the completion of the works and which had not been foreseen by him and either pay the whole cost or make an offer in settlement.

For all the reasons we have given, the plaintiff must fail; the action is dismissed.

Authorities

Hudson's Building and Engineering Contracts (10th Ed'n): p.p. 49-56; 198-234; 264, 265; (4th Ed'n) p.p. 52-53; 269, 279, 376.

Sharpe -v- San Paulo Railway Company (1873) L.R. 8 Ch. App. 597.

4 Halsbury Vol. 4: paras. 1174-1178.

John Uff: Construction Law (4th Ed'n) Vol. 4: p.p. 128-133.

Macready -v- Amy (1959) J.J. 11.

Granite Products Limited -v- Renault (1961) J.J. 163 at p.168.

Wallis -v- Taylor (1965) J.J. 455 at p.457.

Basden Hotels Limited -v- Dormy Hotels Limited (1968) J.J. 911 at p.919.

Grimshaw -v- Ruellan (1976) J.J. 299 at p.307.

Concise Oxford Dictionary (16th Ed'n) p.p. 915 and 354-5.