

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Evans and others v. Our Sovereign Lady the Queen, from the Supreme Court of Victoria; delivered 1st February, 1866.

Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from the Judgment of the Supreme Court of Victoria upon demurrers to the pleadings on a Petition of Right presented for alleged breaches of an agreement entered into between the petitioners (the Appellants) and the Board of Land and Works in the Colony for the formation and completion of a line of railway called "The Geelong and Ballarat Railway."

The petition states the articles of agreement dated the 22nd July, 1858, and recitals contained in them to this effect, that the Board of Land and Works had accepted the tender of the petitioners for the formation and completion of the line of railway, that the petitioners had paid 30,000*l.* into the Treasury of Melbourne as security for due performance of the contract, and that a specification of the works had been prepared, containing divers conditions, clauses, and stipulations, with schedules of quantities and prices, and supplementary schedules of prices, a copy of which specification was annexed as a schedule to the agreement. The petition then sets out the following covenant and proviso contained in the Articles :—

"This indenture further witnesseth that the Board

of Land and Works covenant with the Appellants, their executors, &c., that in consideration of the premises and of the covenants herein contained on the part of the said contractors, the Government of Victoria shall and will from time to time pay to the said contractors the amount which shall, under the provisions contained in the 29th clause of the said specification in the schedule hereto, be certified from time to time by the engineer in chief to be due for work performed under this contract, and will pay such amount immediately upon the granting of the certificate thereof, deducting 10 per cent. thereof, to be retained in the hands of the Government until such deduction shall amount to the sum of 10,000*l.*, when the amount retained may, at the option of the contractors, be invested in Victorian Railway debentures, bearing interest, which interest the contractors shall be entitled to receive as it becomes due, and shall and will pay the balance which shall remain due to the contractors, their executors, &c., after the completion of the said works, including the balance which may remain of the 30,000*l.*, the cash security hereinbefore mentioned, at the respective times and in the manner provided by the 41st and 42nd clauses of the said specification, as appearing in the said schedule hereto."

"Provided always, and it is hereby expressly agreed and declared that the amount payable to the said contractors for the performance of the said works shall be estimated by the prices mentioned in the schedules and supplementary schedules contained in the said specification, in accordance with the 34th clause thereof; but in the event of there being any discrepancy between the amount in the schedules and the gross sum of 1,271,841*l.* 1*s.* 2*d.* mentioned in the tender, a copy whereof is contained in the schedule to these presents signed by the contractors, and countersigned by the engineer in chief, and such amount shall be in excess of such gross sum, the contractors shall be bound by such gross sum, and all the prices in the schedules, exclusive of the supplementary schedule, shall be reduced in respect of all works performed under this contract in proportion to such discrepancy or excess."

The petition also states (amongst others) the following conditions of the specification, viz. :—

20th Condition. All extras ordered shall be paid for, and all deductions for omissions shall be made in accordance with the schedule of prices, which the contractors shall set opposite the quantities in their tender, as hereunto annexed, and the opinion of the engineer in chief on all such points, and on every other question connected with the execution of the works, shall be final and binding on all parties.

29th Condition. The contractors shall, at the end of every fourteen days, furnish to the engineer in chief a detailed account of the work actually done on each bridge, culvert, viaduct, and tunnel, excavations, embankments, side cuttings, back cuttings, and also of the materials which have been used in the construction of such works, which account he will examine, and if correct he will certify the same, and on his certificate the Government will pay to the contractors the amount so certified, deducting 10 per cent. to be retained in the hands of the Government until such deduction shall amount to the sum of 10,000*l.*, when the amount retained may, at the option of the contractors, be invested in Victorian Railway debentures, bearing interest, and the contractors shall be entitled to receive the interest accruing on the said debentures, as it becomes due.

And the 43rd Condition (E). The schedules of quantities attached to the specifications are to be considered to represent the work undertaken to be performed under the several contracts, and it is to be distinctly understood that the engineer in chief reserves to himself full power to make any alterations, additions, and deductions, to be allowed for at the rates set against the several items of the schedules of quantities and supplementary schedules accompanying the tender.

The Petition then alleges the following breaches of the agreement :—

1st. That Her Majesty did not pay to the Petitioners immediately upon the granting of the engineer's certificate the amount so certified, less 10*l.* out of every 100*l.* of such amount.

2nd. That the deductions amounted to 10,000*l.*, and were retained in the hands of the Government, yet that Her Majesty did not, after the deductions amounted to that sum, pay to the Petitioners imme-

diately upon the granting of the certificates the amount so certified.

3rd. That a schedule of prices was by the Petitioners set opposite the quantities in their tender, and that they performed and executed divers extra works, and that previous to the commencement thereof, a written order for the same from the Engineer-in-chief was obtained and produced by the Petitioners, and an account for the same forwarded to the office of the said Engineer-in-chief, but that the extras were not paid for according to the schedule, but at another and different rate of payment.

The only pleas to the Petition which are necessary to be noticed are the second and the sixth.

By the second plea, which is pleaded to the first and second breaches, the Attorney-General, after setting out the forty-third condition of the specification, avers "that the whole work in the same contract was comprised in seven sections, being the same mentioned in the recapitulation hereinafter mentioned, and that after the several conditions in the said Petition and in this plea set forth, the said Articles of Agreement contained and incorporated as a part thereof, the following clause (that is to say):—

RECAPITULATION.

		£	s.	d.
Section No. 20	417,462	6	3
„ 21	107,911	11	10
„ 22	206,472	18	5
„ 23	96,473	2	2
„ 24	127,765	0	9
„ 25	169,185	7	4
„ 26	246,693	8	11
		1,374,963	15	8
Less 7½ per cent. for the entire work.		103,122	4	6
		£1,271,841	11	2

GEO. S. EVANS.

W. R. MERRY.

WM. LITTLE.

GEO. C. DARBYSHIRE.

Witnesses:—

S. M. SOUTH.

ED. SANDFORD.

And the Attorney-General avers that the figures set after each section in the said recapitulation represented the estimated costs of the work of each section at the rates set against the several items of

the schedule of quantities and supplementary schedules accompanying the tender, and which were part of the said Articles of Agreement; that the Petitioners were allowed by Her Majesty to execute, and did execute, the entire works in the said several sections in the said recapitulation mentioned, excepting certain alterations and deductions made therein, thereto, and therefrom by the Engineer-in-chief; and that every certificate mentioned in the said breach was for a sum forming part of the said sums set after the said sections in the said recapitulation, and for work forming part of the work represented by the said sums so set after the said sections, and that immediately on the granting of every certificate in the said breach mentioned, the amount so certified, less 10*l.* and less 7*l.* 10*s.* out of every 100*l.* of such amount, was paid to the Petitioners."

The sixth plea, which is pleaded to the third breach, is similar to the second, but avers that the extra works in the said breach mentioned were deviations from and additions to the works in the said sections in the said recapitulation mentioned, made by direction of the said Engineer-in-chief; and that immediately on the granting of certificates for the said deviations and additions, in accordance with the 29th condition of the said specification, the amounts of the said certificates were paid to the Petitioners, less 10*l.* for every 100*l.*, and less 7*l.* 10*s.* out of every 100*l.*

The Petitioners in their replication to the second plea say that the schedule of prices in that plea mentioned to accompany the tender was and is the same identical schedule of prices in the Petition mentioned to have been set opposite to the quantities in their tender by the Petitioners.

And they demur to the sixth plea, which they say is bad in substance, "for that the 20th condition provides that all extras shall be paid for in accordance with the schedule of prices. It is no answer to a breach of that condition to allege that payments were made, deducting 17*l.* 10*s.* per centum; that the fact of the engineer having given a certificate not in accordance with the schedule is no excuse for disregarding the said condition; that the plea confesses the said breach, but does not in any manner legally or sufficiently avoid the same."

The Attorney-General demurs to the replication to the second plea, and says that the same is bad in substance, and for cause of demurrer says "that the fact of the schedule of prices in the second plea mentioned being the same as that in the Petition mentioned to have been set opposite the quantities in their tender by the Petitioners, is no answer to or avoidance of the contract in the recapitulation in the said plea set forth. That 7*l.* 10*s.* should be deducted from the sum to be paid to the Petitioners in the events in the said plea mentioned, less 10*l.* per cent. to be retained pursuant to the said 29th Condition; and that the said replication confesses the said plea, but does not sufficiently and legally avoid the same."

The petitioners points marked for argument were the following:—

1. That no deductions were to be made after the retained per-centage amounted to 10,000*l.*

2. That the 7½ per cent. was to be deducted only in the event of the "entire work" being executed. That as part of the entire work has been abandoned, the condition on which the deduction is to be made does not attach.

3. That the 7½ per cent. is not under any circumstances to be deducted from the extras.

The demurrers were argued before the Supreme Court of Victoria, and upon all the points above mentioned the Court unanimously gave Judgment for the Respondent.

From this Judgment the present Appeal is brought.

The case has been twice argued. Upon the first argument their Lordships had before them only such portions of the articles of agreement and specification as are contained in the record, but being unwilling to decide the case upon a partial view of a contract, in parts of it very obscurely and uncertainly worded, they desired to have the entire contract printed, together with specimens of the different parts of the schedules, and the form of the engineer's certificates. This has been done by arrangement between the parties (with the exception of the form of the certificates of the engineer) and upon the materials now before them they proceed to deliver their opinion.

Upon the demurrer to the second plea, the first question for their determination is whether 10 per

cent. was to be continued to be deducted from the amount of the engineer's certificates after the deductions had amounted to 10,000*l.*

Upon this question their Lordships agree with the Judgment of the Court below.

The deduction of 10 per cent. from the certificates was intended as an additional security to the 30,000*l.*, which the contractors were to provide for the faithful performance of the works.

The covenant does not say that when the deductions reach the limit of 10,000*l.* they are to cease to be made, but that "they are to be retained in the hands of Her Majesty until they amount to that sum, when the amount retained may be invested at the option of the contractors in Victorian Railway debentures." The object was that a large sum of money which would eventually belong to the contractors should not in the mean time be locked up from them in the hands of the Crown, but that from time to time, as the accumulations amounted to so large a sum as 10,000*l.* they should be invested so as to yield interest for their benefit.

The next point upon the demurrer to the second plea arises upon the allegations that "the petitioners were allowed to execute the entire of the said works in the recapitulation mentioned, except certain alterations and deductions made therein, thereto, and therefrom by the engineer in chief, and that immediately on the granting of every certificate in the breach mentioned, the amount so certified, less 10*l.*, and less 7*l.* 10*s.* out of every 100*l.* of such amount was paid to the petitioners."

In the Court below it was argued that the plea was bad because it showed that part of the work had been abandoned, and that the 7*l.* 10*s.* was to be deducted only in the event of the "entire work" being executed.

The same objection was in the first instance raised before their Lordships, but in the course of the argument an entirely new point was started, viz., that the plea averred the payments of the certified amounts, less 10*l.* for every 100*l.*, and less 7*l.* 10*s.* out of every 100*l.*, so that it appeared that the 10*l.* and the 7*l.* 10*s.* were each of them deducted from the total amount, whereas the 10*l.* ought to have been deducted after the reduction of each 100*l.*, by 7½ per cent.

It was admitted by the Respondent that the proper mode of making the deduction of the 10 per cent. was correctly suggested by the Appellants; but it was insisted that the words of the plea amounted to an allegation that this was the actual course pursued with respect to the sums contained in the certificates. Their Lordships, however, think that the plea is not capable of being so construed. If the payments were really made according to this course, an amendment might be allowed. But as $7\frac{1}{2}$ per cent., in addition to 10 per cent., was actually deducted from the certificates, the plea, in whatever way amended, would necessarily aver this deduction, and would therefore equally raise the question whether it ought to have been made during the progress of the works.

The argument that the $7\frac{1}{2}$ per cent. was not to be deducted unless the entire work was done cannot prevail, and has no other foundation than the words of the recapitulation, "less $7\frac{1}{2}$ per cent. for the entire work." This means no more than that the contractors, having estimated the value of the whole work, were willing to allow a discount of $7\frac{1}{2}$ per cent. off the amount. If the Appellant's construction were correct, the Engineer could not have ordered the most trifling part of the work to be omitted without entitling the contractors to the scheduled prices without this deduction. But by the 43rd Condition of the Specification the Engineer reserved to himself full power to make any deductions he might think fit from the works of the contract, and it can hardly be supposed that it could have been intended that if he exercised this power the price of all the rest of the work was to be immediately raised $7\frac{1}{2}$ per cent. The reasonable interpretation of the words, "less $7\frac{1}{2}$ per cent. for the entire work," must be that the $7\frac{1}{2}$ per cent. is to be deducted for the entire work actually performed under the contract.

The real difficulty of this part of the case lies in the question whether the $7\frac{1}{2}$ per cent. was to be deducted at all from the amount of the certificates given by the Engineer, on which the payments to the contractors took place.

This question depends upon parts of the contract which are most difficult of construction; but after careful consideration their Lordships have come to

the conclusion that it was not the intention of the parties that this deduction of $7\frac{1}{2}$ per cent. should be made during the progress of the works.

By the 29th Clause of the Specification, it is stipulated that the contractors are, "at the end of every fourteen days, to furnish to the Engineer-in-chief a detailed account of the work actually done, and also of the materials which have been used in the construction of such works, which account he will examine; and if correct, he will certify the same." The Board of Land and Works covenant with the contractors "to pay the amount which shall, under the provisions contained in the 29th Clause of the said Specification, be certified from time to time to be due for work performed under this contract, and will pay such amount immediately upon the granting of the certificate."

From the words of this covenant it is clear that the certificate of the engineer was to contain the sum which was to be paid to the contractors.

In what manner was this sum to be arrived at? This is explained by the proviso in the 5th page of the printed contract in these terms, "Provided always, and it is hereby expressly agreed and declared, that the amount payable to the said contractors for the performance of the said works shall be estimated by the prices mentioned in the schedules and supplementary schedules contained in the said specification, in accordance with the 34th clause thereof." Thus whether the work done was to be priced by the engineer or by the contractors, the certificates were to contain an amount founded altogether on the scheduled prices, and this amount the Government covenanted to pay with the deduction only of 10 per cent. The further deduction of $7\frac{1}{2}$ per cent. from the certificates seems to be expressly excluded by the terms of the contract; and the latter part of the proviso, to which reference has been already made, renders it more clear that this must have been the intention of the parties. After stating (as already mentioned) that the amount payable to the contractors shall be *estimated* by the prices in the schedules, it proceeds, "But in the event of there being any discrepancy between the amount in the schedules and the gross sum of 1,271,841*l.* 1*s.* 2*d.* mentioned in the tender, &c.,

and such amount shall be in excess of such gross sum, the contractors shall be bound by such gross sum, and all the prices in the schedule, exclusive of the supplementary schedule, shall be reduced in respect of all works performed under this contract in proportion to such discrepancy or excess." It is difficult to understand the exact meaning of the last part of this proviso; but whatever it may be, one thing is plain, that the operation provided for could not take place until the completion of the work, before which time it could not be ascertained whether there was any excess of the gross sum mentioned in the tender. It would almost appear from the terms of this proviso that if the amount of the works estimated by the prices in the schedule should not upon the completion of the contract works be found to exceed the sum of 1,271,841*l.* 11*s.* 4*d.*, the contractors would be entitled to that sum, or to whatever the work might amount to at the scheduled prices within that limit, the 1,271,841*l.* 11*s.* 4*d.* being to be regarded merely as a maximum amount. Be this, however, as it may, the plea is, in the opinion of their Lordships, clearly bad, because it attempts to answer the breaches of non-payment of the amounts certified to be due to the Petitioners, "less 10*l.* out of every 100*l.*," by averring a payment of the amount so certified, less 10*l.*, and also less 7*l.* 10*s.* out of every 100*l.* of such amount.

The only remaining point is as to the principle of payment for extra work.

The 20th Condition of the Specification states that "all extras shall be paid for, and all deductions shall be made, in accordance with the schedule of prices which the contractor shall set opposite the quantities in his tender."

And by the additional Clause 43 *e*, in which the Engineer reserves to himself power to make alterations, additions, or deductions, it is provided that "such alterations, additions, and deductions are to be allowed for at the rates set against the several items of the schedules of quantities and supplementary schedules accompanying the tender."

It was argued for the Respondent that if payment were made in full for the extras, it would not be "in accordance with the schedule of prices," or with the rates set against the several items of the

schedules of quantities, which must always be understood as subject to a reduction of $7\frac{1}{2}$ per cent., according to the tender in the recapitulation.

But in the opinion of their Lordships this argument is not well founded. The scheduled prices cannot be regarded as being throughout subject to a reduction of $7\frac{1}{2}$ per cent. The contractors might very well decline to reduce their prices in detail, and yet be willing to take off a per-centage from the gross sum, to be earned at these prices. This is what they propose to do in the only part of the contract on which this argument rests. The words at the foot of the Recapitulation are expressly confined to the contract work. There is nothing to be found in the contract itself to qualify the stipulation that the extras are to be allowed for "at the rates set against the several items of the schedules of quantities and supplementary schedules." The proviso already considered (obscure as it is) confirms the view that the extras were not to be subject to deduction, because it provides that in the event of any excess beyond the gross sum in the tender, the prices in the schedules, exclusive of the supplementary schedule, shall be reduced. The supplementary schedule contains a list of the prices at which all the additional works are to be valued. So that, although the prices of the contract work are to be reduced in case of excess beyond the stipulated amount for such work, those of the additional works, or extras, are not to be touched.

Their Lordships will, therefore, recommend to Her Majesty that the Judgments entered for the Respondent on the 2nd and 6th pleas to the Petition be set aside, and Judgment entered upon those pleas for the Appellants. But as the point on which their Lordships have decided in favour of the Appellants upon the 2nd plea was not taken in the Court below, they think there ought to be no costs of the Appeal.

