Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lodder and another v. *Slowey, from the Court of Appeal of New Zealand; delivered the 22nd June* 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

In the month of December 1897 a contract was made between the Corporation of Karori in the Colony of New Zealand acting by its Borough Council with one John McWilliams for the construction by him of certain road works including a tunnel. The contract was subject to certain conditions by which it was provided (Clause 1) that the contractor should execute the works according to the specification and to the entire satisfaction of Thomas Ward, Civil Engineer, (Clause 4) that the Engineer of the Borough Council should be the sole judge in all matters or questions arising out of the contract and of quality of materials or workmanship, meaning of specification, rate of progress, and general management, and that his decision should be final and conclusive in all cases, and (Clause 8) that, should the contractor not proceed with sufficient expedition in the performance of the work or not execute the same

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in compliance with the specification or drawings, it should be in the power of the Engineer on behalf of the Borough Council to enter on and take possession of the works and materials and complete the same at the expense of the contractor or re-let such works to another contractor, and any loss should be recoverable from the contractor or, in the alternative, to determine the contract, and on such determination the money paid under the contract should be accepted by the contractor in satisfaction of all claims under the contract.

The Appellants entered into a bond with the Borough Council in the sum of 500*l.* for the due carrying out by McWilliams of his contract. The bond itself is not printed in the Record and their Lordships do not know the exact terms of it.

In September 1898 McWilliams made default and, in fact, abandoned the works. The Borough Council thereupon called upon the Appellants under their guarantee, and in the result a contract, dated the 15th November 1898, was made between the Appellants and the Respondent for the execution by the latter on or before the 2nd March 1899 of the works undertaken by McWilliams and left incomplete by him. This contract contained a provision that the Respondent should be deemed to have full notice of the contents and effect of all the various documents constituting McWilliams' contract and to be bound by all the terms and conditions of such contract so far as the same were then applicable to the present contract and capable of being carried into effect.

It may be useful at this point to consider the relation which was thus constituted between these three parties, the Borough Council for whom the works were to be executed, the

Appellants, and the Respondent. The Borough Council and the Appellants seemed to have assumed that on McWilliams' default the Borough Council had the right to call upon the Appellants to complete the works, or that the Appellants had an option whether they would do so or pay the penalty on the bond. At any rate they elected to take that course with the acquiescence of the Borough Council without, however, binding the Corporation by any contract with them. Probably all parties considered that that they were subrogated to McWilliams' rights and subject to his liabilities. Instead of executing the works themselves, the Appellants engaged the Respondent to do so. *Quoad* the Borough Council the Respondent was therefore in the position of a sub-contractor only, and there was no privity of contract as between them. But as between the Appellants and the Respondent each party was liable to the other one for any breach of the contract. The learned Counsel for the Respondent referred their Lordships to some letters which passed between the solicitors of the Appellants and the Borough Council respectively, in the month of February 1899. It was then arranged, at the suggestion of the Appellants themselves, that the Respondent and the Borough Council should deal directly with each other, but without interfering with the position of the Appellants towards the Council, and, in answer to an inquiry from the solicitors of the Borough Council, it was explained that the meaning was that the Respondent should be the agent of the Appellants in making all arrangements about the tunnel, &c. These letters appear to explain the relative positions of the parties to each other with sufficient clearness.

Perhaps the expression that the Respondent was to be deemed the agent of the Appellants

was not a very happy one, but it clearly meant that the Appellants were, in a question between them and the Borough Council, to be bound by arrangements made with, and instructions given to, the Respondent in the course of the execution of the works. On the other hand, by allowing the Borough Council to deal with the Respondent directly, the Appellants, in any question on the contract between them and the Respondent, made the Borough Council, acting through their proper officer, the agents of the Appellants as regards all matters relating to the execution of the contract, and *quoad* the Respondent assumed the responsibility for any directions or instructions given by the Council. In fact the execution of the works was proceeded with on this footing. The Respondent dealt directly with Mr. Ward, the Engineer of the Borough Council, and received his orders and instructions from him. And the Appellants left the entire supervision and superintendence of the Respondent's execution of the works to Ward.

The contractor failed to complete the works within the time specified in the contract, and in the month of July 1899 letters were written by Mr. Ward to the Appellants complaining of the condition of the works and threatening to take the works out of their hands and complete them at their expense. Copies of these letters were forwarded by the Appellants to the Respondent with an intimation that unless something was done to satisfy Mr. Ward, it would be necessary for the Appellants to take the work out of the Respondent's hands and complete it at his expense. On the 3rd of August 1899 the officers of the Borough Council, purporting to act under the power contained in the eighth condition of McWilliams' contract, entered upon and took possession of the works.

The Respondent shortly afterwards commenced the present action against the Appellants, and by his Statement of Claim dated the 6th November 1899, after alleging that the Appellants had wrongfully entered and taken possession of the works and wrongfully determined, repudiated, and declined on their part to perform their contract, the Respondent claimed for work and labour done and materials supplied by him at the request of the Appellants and, alternatively, damages for breach of contract.

The Corporation of Karori was afterwards added as a Defendant.

The action was tried before Mr. Justice Edwards and a jury in July 1900. The jury returned a special verdict in answers to 27 questions left to them. For the purpose of this Appeal the most material findings are those numbered 7, 10, 14, 17, and, 24.

"7. Did the Defendant Corporation prior to the "seizure of the works improperly prevent the "Plaintiff from proceeding with the works in "the manner authorised by his Contract? "Answer: Yes.

"10. Was such seizure wrongful? Answer: "Yes.

"14. Did the Plaintiff proceed with the works "with the rate of progress required by the "Defendant Corporation's engineer? Answer: "Yes, except that he did not comply with the "letters of July 21st and 25th.

"17. Did the Defendant Corporation prevent "the Plaintiff from proceeding with the said "works with sufficient expedition?—Answer: "Yes."

"24. What would have been the profit which "the Plaintiff would have obtained if he had "been allowed to finish his contract?—Answer: "No evidence that any profit would have been "made."

The learned Judge, on cross-motions for judgment and non-suit by the Plaintiff and both Defendants respectively, held that the Corporation were under no contractual liability towards the Respondent and were liable only for the agreed value of certain plant which they had taken. There is no appeal from this part of the Judgment. As against the Appellants he held that there was an implied warranty by the Appellants that the Respondent should have undisturbed possession of the land for the purposes of the contract, and the Appellants were liable to the Respondent for breach of this implied warranty. But he held that the measure of damages was the amount (if any) which the Respondent had lost by exclusion from the works before completion, and as there was no evidence before the jury that the Respondent had suffered any loss, he gave them the option of a new trial. And the learned Judge entered Judgment, dated the 25th of August 1900, accordingly.

This Judgment was reversed by the Court of Appeal, and by their Judgment of the 1st February 1901 Judgment was ordered to be entered for the Respondent for 1,015*l.* 5*s.* with costs. The present Appeal is from this Judgment.

The learned Judges in the Court of Appeal agreed with Mr. Justice Edwards that the Appellants were liable to the Respondent for the wrongful re-entry and seizure by the Borough Council, but on rather different grounds. Mr. Justice Connolly held that Ward must be treated as agent for the present Appellants, with an almost unlimited authority to act for them and bind them in responsibility for his acts. Mr. Justice Williams, while agreeing with the views expressed by Mr. Justice Edwards, thought further that even if that conclusion were

incorrect, there was an implied warranty or an implied condition of the contract that the Respondent should not be wrongly interfered with by the person to whom by the contract the Appellants had entrusted the superintendence of the Respondent's work, viz., the Engineer to the Borough Council. On the measure of damages the learned Judges differed from Mr. Justice Edwards. They adopted the statement of the law in the notes to *Cutter* v. *Powell* in "Smith's Leading Cases," and they thought that Lord Cranworth's judgment in *Ranger* v. *The Great Western Railway Company* (5 H.L. Ca. 72), which had been relied on by the learned Judge in the Court below, had been misapplied. All that that case decided, in their opinion, was that the Appellants had no claim to equitable relief. Accordingly they held that the Respondent was in the circumstances entitled to treat the contract as at an end and to sue on a *quantum meruit* for work and labour done and materials supplied, the net amount of which the jury had found to be 1,015*l.* 5*s.*

Their Lordships agree with the conclusion of the Court of Appeal. They do not dissent from the contention of Mr. Skerrett, in his very able argument for the Respondent, that in the circumstances of this case it was an implied term of the Appellants' contract with the Respondent that the Borough Council would permit the Respondent, who was in the position of a sub-contractor, to perform his contract. But they think that the simplest and safest ground on which to rest the liability of the Appellants is that they made the Borough Council, acting through their Engineer, their agents for superintending the Respondent's execution of his contract with full power to act for them in respect thereto. Not only is this proved by the arrangement made by the Appellants with the Borough Council that the Respondent should

deal directly with the Council and by the actual course of dealing by all parties, but their Lordships think that it was also in accordance with the contract which by Clause 8 incorporated the conditions of McWilliams' contract so far as then applicable.

It was, however, contended for the Appellants at their Lordships' Bar that according to the true construction and effect of Clause 8 of the Respondent's contract the Borough Council had the right to re-enter upon the works if, in the opinion of the Engineer, the Respondent was not proceeding with sufficient expedition in the performance of the work. For this purpose it was said the Engineer was not acting as the officer of the Borough Council, but was placed by the contract in the position of an arbitrator or referee, and his decision was made conclusive on the rate of progress. No imputation, it was rightly said, had been made upon Mr. Ward's good faith, and, therefore, the re-entry must be held to have been rightfully made and no cause of action arose from it.

Admitting this to be so and assuming that the true effect of the incorporation of the conditions of McWilliams' contract so far as the same were then applicable was to give the right of re-entry, under Clause 8 of McWilliams' contract, not to the Appellants, but to the Borough Council, the answer to the argument appears to their Lordships to be that the jury have found (7) that the Corporation prior to the seizure of the works improperly prevented the Respondent from proceeding with the works in the manner authorised by his contract, and (17) that the Corporation prevented the Respondent from proceeding with the works with sufficient expedition.

It was not suggested before their Lordships that these matters were not properly before the jury, or that the questions were not properly left

to them, or that there was not evidence before them on which they could properly find as they did. Their Lordships do not think that the Appellants are precluded by the express finding that the seizure was wrongful from raising any questions of law, but they think that the 7th and 17th findings are fatal to the Appellants' argument. The Corporation of course means the Borough Council, acting by their Engineer, Mr. Ward. Their Lordships have already expressed their opinion that the Borough Council and Ward were made the Appellants' agents for the purpose of superintending the execution of the contract by the Respondent, and the acts done and orders given by the Borough Council or Ward, which the jury have found prevented the Respondent from proceeding with the works with sufficient expedition, were therefore within the scope of the authority conferred by the Appellants. Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent. (*Roberts* v. *Bury Improvement Commissioners*, L.R., 5 C.P. 310).

Their Lordships also agree with the learned Judges as to the proper measure of damages or (more accurately) as to the right of the Respondent to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract.

Their Lordships will therefore humbly advise His Majesty that the Judgment appealed from should be affirmed and the Appeal dismissed. The Appellants will pay the costs of the Appeal.