Privy Council Appeal No. 53 of 1921.

Sydney S. Forbes - - - - - - - - *Appellant*

v.

Jean K. Git and others - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH DECEMBER, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD SUMNER.
LORD WRENBURY.
LORD CARSON.

[*Delivered by* LORD WRENBURY.]

The appellant is a building contractor. The respondents are restaurant keepers, who may be called the building owners. The question on the appeal is as to the construction of a contract between these parties for works of alteration, construction and fitting up in a restaurant and public dining-room on the first floor over 119½, King Street East, in the city of Hamilton. The contract is dated the 5th March, 1919, and is made between the building owners of the first part and the contractor of the second part. The relevant clauses are three in number, and for convenience will be referred to as the first, second and third clauses.

After a recital that the contractor has agreed to supply certain materials and perform certain services, the deed proceeds by the first clause as follows:—

> "Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000·00) to be paid as follows: One thousand dollars ($1,000·00) on the signing of this agreement, further sum of one

thousand dollars ($1,000·00) when it appears to the satisfaction of all of the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500·00) and the balance or sum of one thousand dollars ($1,000·00) thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform services as hereinafter set forth."

The deed then details the work to be done and the materials to be supplied. These leave such things as the size of a mirror, the size and location of a private sleeping-room and the size and location of two public dining-rooms "to be agreed upon between the parties."

The deed then proceeds by the second clause as follows :—

"The parties of the first part covenant with the party of the second part that if it is ascertained upon the removal or the attempting to remove the partition or partitions that the construction of the building will not permit such removal without serious damage to same then this agreement is to be at an end and the parties of the first part will reimburse the party of the second part for labour expended up to such time and the party of the second part covenants that he will return so much of the one thousand ($1,000·00) payment as remains after satisfying his claim for labour performed."

Next follows the third clause which runs as follows :—

"The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000·00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000·00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000·00) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one-half per cent."

The work to be done as described in the contract was very largely varied, added to and departed from, not merely by the addition of extras, but by substantial and extensive alterations in the scheme.

A dispute arose between the parties as to the amount payable by the building owners. The contractor brought an action against the building owners in the County Court at Hamilton to recover $3,830·36, being as he alleged the amount due to him on the footing that under the third clause he was entitled to the difference between a sum of $7,010·36, which he said was due under the third clause, and the sum of $3,180, which had been paid him on account. The County Court Judge held that the third clause was repugnant to and inconsistent with the first clause and was to be rejected, and he gave judgment only for the $3,000 under

the first clause, with the addition of the value of certain changes (that is to say, additional work) which he identified.

The Supreme Court of Ontario reversed this judgment, holding that the first and third clauses were to be read together and effect was to be given to the third clause.

On appeal the Supreme Court of Canada reversed the judgment of the Supreme Court of Ontario and restored the judgment of the County Court Judge. By special leave the case is brought on appeal to this Board.

The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay £100 and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay £100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.

Furnivall v. *Coombes*, 5 M. & G. 736, is an illustration of the former case: *Williams* v. *Hathaway*, 6 Ch. Div. 544, is an illustration of the latter.

In the latter case there could be no question if the later provision of the deed were introduced by the word " but " or the words " provided always nevertheless," or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

Their Lordships do not find that any of the Judges in the Supreme Court of Canada differed upon this point or doubted that the principle to be applied is such as stated above. But four of them found, while the Chief Justice and Mr. Justice Duff did not find, repugnancy between the first clause and the third. To ascertain whether such repugnancy exists it is necessary to scrutinize the deed.

The first clause provides that in consideration of a certain sum payable in certain instalments the contractor will furnish certain materials and perform certain services. The second clause says that in a certain event that sum is not to be paid, that the agreement is to be at an end and payment is to be made only for labour expended. The operation of the first clause is therefore obviously qualified by the second clause. The first clause, therefore, does

not prevail in every event. It falls to the ground in the event named in the second clause.

Then comes the third clause, on which the question arises: If this were introduced by the word " but " or the words " provided always nevertheless " there would be no room for argument. Their Lordships cannot find that the absence of such words makes any difference. The third clause does not destroy the first, but qualifies it. Its effect may be said to be to make the $3,000 of the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause. The obligation of the first clause is qualified not only by the second clause (as it obviously is), but by the third clause also. Their Lordships find no difficulty in reading the first and third clauses together and giving effect to the intention disclosed by the deed as a whole.

There is another consideration leading to the same result which their Lordships desire to add. If the first clause stood alone it may well be that the contractor bound himself to do certain work and to accept as payment an agreed sum of $3,000 payable in certain instalments. But the clause does not necessarily bear that meaning. It may mean that in consideration of $3,000 payable by certain instalments he binds himself to do certain work for a sum which you will presently find defined. If one farmer says to another, " In consideration of your inviting me to your Christmas dinner I will make your hay for you next summer," he does not necessarily mean that the dinner will be accepted as the price of making the hay—he may mean that if he is invited to dinner he will bind himself to find the time and the necessary implements and the labour for making the hay when the summer comes, leaving the amount to be paid for the work to be determined later. When Anglin, J., says :—

> " By the first clause of a contract under seal the plaintiff ' covenanted, promised and agreed ' to do certain specified work in the nature of alterations to a building for the sum of $3,000 payable in three instalments of $1,000 each ";

and when Mignault, J., says :—

> " The first court considered absolutely irreconcilable the clause in the contract that the respondent would for the sum of $3,000·00 perform the work and furnish the materials specified ";

and again :—

> " The work by the first clause is to be performed for a fixed price";

neither of those learned Judges is correctly quoting the contract. There is no contract in the first clause to do the work *for* $3,000. The contract is that in consideration of $3,000 he will do the work. It is necessary to read the contract as a whole to see whether the $3,000 is to be the contract price for the work, or is to be a payment for undertaking the obligation to

do the work. If there were no third clause it may well be that the $3,000 would be the contract price, but looking at the third clause their Lordships do not find that it is.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court of Ontario was right—that this appeal should be allowed and the order of the Supreme Court of Ontario should be restored and that the appellant should have his costs here and in the Supreme Court of Canada. They will humbly advise His Majesty accordingly.

In the Privy Council.

SYDNEY S. FORBES

v.

JEAN K. GIT AND OTHERS.

DELIVERED BY LORD WRENBURY.

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