C. T. R. KELLY
&
S. S. Pilch trading as C. T. R. Kelly & Partners
v.
NORTHSHORE DEVELOPMENT CO. LTD.

March 7, 8, 11, April 5
Duffus P. (ag.)
Lewis J. A. &
Waddington J. A. (ag.)

Contract – building contract – agreement between quantity surveyors and owners of land desirous of making a sub-division – construction of terms 'measured omissions' and 'measured additions' – technical terms – admissibility of extrinsic evidence to explain – work done outside the contemplation of parties – application of quatum meruit.

The terms of the contract which the Court had to construe, were contained in an exchange of letters between the plaintiffs-appellants who as owners of land in Mamee Bay, St. Ann intended to make a sub-division, and employed the defendants-respondents, as Quantity Surveyors to prepare bills of quantities, based on plans prepared by the Architects of the plaintiffs-appellants, and to act generally as Quantity Surveyors throughout the work contemplated. The material portion of the contract with which the appeal is concerned, is as follows:

"(d) For the adjustment of variations during the course of the work: 2½% on the value of measured additions and 1½% on the value of measured omissions where the exercise of professional skill is required."

The plantiffs contended that the whole of the work done ultimately, constituted variations or a series of variations from the original contract (that is the contract between the owners and the contractors) and the charge was 2½% of the total cost of the work as ultimately executed. The defendants contended that the plaintiffs were only entitled to charge 2½% on the amount the job had cost in excess of the original estimate. The trial judge agreed with the view put forward by the respondents, and awarded the plaintiffs damages on that basis. At the trial, the trial judge refused to admit evidence to prove the technical meaning of the words "measured additions" or "measured omissions", on the ground that the language was clear and unambiguous on the face of it and "the Court was not satisfied that the parties did not intend to use the words in their ordinary sense."

After the work began, for a variety of reasons, variations took

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place in the original plans, and eventually the variations were so many and so substantial, that virtually every item of work in the original plan was varied. The appellant's evidence was that the work ultimately executed varied in all material and substantial respects from the work planned.

Held:—that a situation had arisen which was not contemplated by the parties at the time the contract was entered into and the appellants were entitled to a fair remuneration as on a *quantum meruit*. *Waddington J. A.* dissenting.

(per *Lewis* J.A.) — Evidence is not admissible to prove that a word in a contract is to be construed in its ordinary meaning and in a special meaning, contradictory of its ordinary meaning according to the events which occur.

David Coore Q.C. for appellants.

V. O. Blake Q.C., and with him *Emile George* for respondents.

Appeal against a judgment of Cools-Lartigue in the Supreme Court on June 20, 1961.

The following cases were cited in argument:-

Shore v. Wilson 9 Cl. & F. 355
Myers v. Sarl & Ors. 30 L. J. Q. B. 9
Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works & Public Buildings (1950) 1 All E. R. 208
Robertson v. French 4 East 130
Mallan v. May 13 M. & W. 511
Grant v. Maddocks 15 M. & W. 371
Fowkes & Anor. v. The Manchester & London Association 3 B. & S. 917
Palgrave Brown & Son Ltd. v. The Turid (1922) 1 A. C. 397
Holt & Co. v. Collyer (1881) 16 Ch. 718
North Western Rubber Co. Ltd. v. Huttenbach & Co. (1908) 2 K. B. 907

Coore — The learned trial judge had applied the wrong principle of law in construing the contract, and the amount which was claimed on the writ, namely £1,718. 11/- was the proper amount to be awarded. The appellants were employed as Quantity Surveyors to prepare bills of quantities, based on the plans prepared by the Architects. In the course of the work, there were so many variations from the original plans, that the work as ultimately executed, varied in all material and substantial respects from the work planned. The appellants had

ultimately to present a final certificate, and for that purpose they had to remeasure all the work done as a consequence of the variations. The original contract was for £46,089. 11. 7; the ultimate cost, in view of the alterations, was £68,742. The appellants were contending that under the contract they were entitled to charge 2½% on the total cost. Letters between the parties made it quite clear that the appellants were in no doubt as to what their charges should be. In a letter dated March 22, 1956 from the appellants to the respondents made it clear that 2½% was chargeable on the gross amount of addition. The appellants were claiming that the whole of the work as executed was a variation of the original work and was therefore an addition. It was of significance to see how the parties had treated and regarded the contract not only before the dispute arose, but up to the time of trial. During the course of the trial a quantity surveyor was called to give expert evidence and objection was taken that the witness was being asked to give the meaning of the words "measured additions" and "measured omissions", the tendency of which was to vary the contract. The learned trial judge was wrong in so doing. In any event, there was enough on the evidence admitted and on the contract document, to show the meaning to be ascribed to the clause in question. If his contention was wrong, then, the contract had not provided for the situation which had arisen, and in this event, the appellants would be entitled on a *quantum meruit*. There was no dispute that the words under reference were other than ordinary English words. Where a word was used in a document and either the document itself or some evidence shows that the word has a technical meaning, then the technical meaning becomes the primary meaning, in which case evidence can be given as to its meaning. Once the witness said they were technical words, the learned judge was bound to accept his evidence. The document was a quantity surveyor document. The evidence which the witness would give, would not vary the contract but explain it.

The clause dealt with scale to be used for the payment of variations, which could take one of two forms; it could take the form of not doing something that was in the original contract, the second was where an additional feature, which was not in the original contract, was included. It also envisaged a situation where something to be constructed was described in one

way, but carried out in another way. That was the type of variation which had occurred in this case. The contractors were required to build roads of a certain specification, but ultimately built roads of a different specification. The evidence in the case showed that "additions" did not mean nett additional cost, but meant work done to re-measure. In the result, where the work done was so substantially different from the work contracted for, so that the entire work had to be re-measured in order to arrive at the final bill, then, the appellants were entitled to be paid at the rate in the clause, as an addition to the total value.

Blake — It was incorrect to say that once the witness called to give expert evidence, stated that the words bore a technical meaning, the judge was bound to accept the evidence. Where ordinary words were used in a document, the Court was bound to interpret them in their plain ordinary meaning, and the Court would not accept extrinsic evidence to give them a special or technical meaning, unless the document or the surrounding circumstances were such, as to show that the parties did not intend the ordinary meaning. The learned trial judge was correct to exclude evidence regarding the meaning of the words.
[*Lewis J. A.* — Are the combination of "measured addition" and "measured omission" phases, met with in the normal course of things?]

Blake — They were ordinary words.

[*Waddington J. A.* (ag.) — Should not a layman entering a specialist field, obtain professional advice?]

Blake — Yes, but if the words used, were ordinary words, then they should be given ordinary meaning. There was nothing in the context to show that the words bore other than their ordinary meaning. Even if the words bore a specialised meaning, evidence of their special meaning would not be admitted, if its effect, was not to explain but to vary or contradict the tenor of the document. If the trial judge was wrong on the ground on which he based his refusal, his conclusion could still be supported on this basis. The special or technical meaning contended for by the appellants would contradict the tenor of the document, because the clause clearly contemplated the respondents' obligation to pay 2½% of something added to the original contract. The special meaning would enlarge the obligation to pay 2½% on value of work as originally planned

plus the value of what was added. An addition, *ex facie*, was something extra, something added to something; it was therefore a part of the whole thing when finally completed and quantified. It would be inconsistent with this view of the document to lead evidence to show that there was an obligation to pay 2½% on the value, not of a part, but of the entire whole, as completed.

It had been contended for, by counsel for the appellants, that the letters passing between the parties could be looked at, for the purpose of construing clause (d), but it was well settled that the previous negotiations of parties to a contract, or their subsequent declarations, as to what they meant was not admissible to affect the construction of a written document. Even if it were granted that some of the letters could be looked at, one of them at least showed when it was written, the situation as had now developed, was not contemplated or envisaged. What the parties had done, could properly be taken into consideration. It was conceded that if the Court came to the conclusion that an entirely new situation, not contemplated by the parties when they came to their agreement, had arisen, the Court could look at all the letters in deciding what the parties did contemplate. They contemplated variations, as either additions or omissions.

[*Lewis J. A.* — The kernel of the matter is whether in the field of quantity surveying, addition meant substitution.]

Blake — With respect to considerations of *quantum meruit*, the appellants would be entitled to remuneration on that basis, if the Court came to the conclusion that a situation not contemplated by the parties had been created. There was abundant evidence to show that the parties had not contemplated the position which had arisen. There was also abundant evidence that however "additions" and "omissions" were interpreted, they could not be made to apply to the facts in the case. A fair and reasonable award would be something between 2½% and 1¼% of the work measured.

Coore — A substitution involved both an addition and an omission. The fact that a situation not contemplated had arisen, was not crucial, if the words used in the document were appropriate to the situation which had arisen. The contract had to be construed *ab initio*, and not by reference to what had

way, but carried out in another way. That was the type of variation which had occurred in this case. The contractors were required to build roads of a certain specification, but ultimately built roads of a different specification. The evidence in the case showed that "additions" did not mean nett additional cost, but meant work done to re-measure. In the result, where the work done was so substantially different from the work contracted for, so that the entire work had to be re-measured in order to arrive at the final bill, then, the appellants were entitled to be paid at the rate in the clause, as an addition to the total value.

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arisen. Even if the evidence of the meaning of the words was excluded, there was nonetheless evidence which showed their meaning. There was therefore evidence before the Court to which no objection had been taken, and which supported the view the appellants were contending for, namely that additions meant work performed, but not according to the original plan. All the work detailed in the original plan had not been performed and that constituted the value of the omissions, and the whole work performed constituted, the value of the additions. A quantity surveyor was paid for work which he actually did, and that should make the matter a simple one. He was paid on different scales, depending on the nature of work he did. Cur adv. vult.

Mr. Justice Duffus, President (acting) read the following judgment:

The Respondent company employed Messrs. Higgs & Hill Ltd., a construction company, to construct roads and lay water mains etc. in a sub-division scheme at Mamee Bay in the parish of St. Ann. The appellants were employed by the respondent company to perform the duties of quantity surveyors in connection with the scheme. These duties included the preparation of Bills of Quantities before tender and the adjustment of variations during the course of the work.

The work was commenced by Higgs & Hill and as it progressed it was found that a great many variations from the original plans and drawings were required by the Respondent company. Under the terms of the contract between the Respondent company and Higgs & Hill, the appellants had to measure all the variations. This entailed a great deal of additional work for the appellants and by the time the job was completed it was found that the variations were so many and so varied that they had of necessity re-measured the whole of the work.

The final cost of the job amounted to £68,742. 1. 0. Higgs & Hills' tender was for £46,089. 11. 7, giving an excess of £22,652. 9. 5.

The appellants claimed that they were entitled to remuneration of 2½ per cent on £68,742 as they had re-measured all the work, whereas the Respondent company submitted that they were only entitled to 2½ per cent on £22,652, the amount

the job had cost in excess of the original estimate, and the learned trial Judge so held.

The main ground of appeal concerned the interpretation of a clause in the contract of employment made between the appellants and Graham Associates Ltd. for and on behalf of the Respondent company. The disputed clause reads as follows:

> " (d) For the adjustment of variations during the course of the work 2½ per cent on the value of measured additions and 1½ per cent on the value of measured omissions, excluding the value of omissions where the exercise of professional skill is not required."

It was the appellants' contention in the Court below and before us that as the whole of the work had to be re-measured the value of the entire work must be regarded as a 'measured addition' and the value of the original estimate treated as a 'measured omission' for which no charge was made, as the exercise of professional skill was not required. In the alternative, it was submitted, the appellants would be entitled to recover on a *quantum meruit* basis.

It seems clear that the basis for the award made by the learned Judge, of whose judgments I have the highest regard, failed to take into account that the essential object of the charge made under clause (d) was to provide remuneration for the quantity surveyors for the actual physical and considerable arithmetical work which would be involved in adjusting variations from the original construction contract which arose during the course of the work.

If one follows to its logical conclusion the interpretation placed on this clause (d) by the Respondents and adopted by the learned Judge, the quantity surveyors would have got nothing at all if the ultimate cost of the job had not been in excess of the original estimate, irrespective of the quantity, nature or cost of the variations each of which may have involved the quantity surveyors in a great deal of physical and mental labour. It is my view that the interpretation which the Respondents place on this clause is patently wrong and cannot be derived from the contract as a whole, nor from a literal interpretation of the actual words used in the clause itself.

Variations may take the form of something different being added to the original plan or something that was to have been

done not being done or a combination of both, which may amount to a substitution, or by doing something in a different way to that originally planned. Clearly if an owner orders these variations he must expect his quantity surveyor to check and measure the work done or not done as the case may be so that he will know what the contractor is to be paid and it follows that the surveyor must be paid according to the work he does, hence the use of the word 'measured' whether it be for additions or omissions so long as it involves a variation of the original plan done during the course of the work. The rate of remuneration stipulated for in clause (d) was based on the money value of each such variation.

No problem may have arisen in the instant case if the variations had not turned out to be so extensive that the whole of the work had to be re-measured. There can be no doubt that this state of affairs was not contemplated when the contract between the appellants and the respondent company was entered into. The appellants' principal witness, George Oswald, said:

> "In this particular case we had to re-measure complete work. This is not usual . . . I contemplated there would very probably be variations of original plan. I had had about 30 years' experience in Quantity Surveying field. I knew that it was possible that alterations might alter certain nature or original plan but such a thing was not in my mind. When I used words 2½ per cent on value of measured additions and 1½ per cent on measured omissions, I did not contemplate position that has now arisen. I knew there would be a considerable amount of re-measuring to be done before because many items in contract were described as 'provisional' and in fact whole of water supply was so described. This meant it would have to be re-measured. I did not contemplate entire work would have to be re-measured."

As I mentioned earlier, the appellants claimed that as the whole of the work had to be re-measured, the value of the entire work should be regarded as a "measured addition", but this cannot be so. The learned Judge found as a fact that Mr. Oswald had conceded that sections of the work were completed in accordance with the original plan, and I agree with him when he says that it is a fallacy to say that the value of the

"measured additions" to the original plan is the value of the entire work. The fact that the surveyors had to re-measure all the work does not mean that they are entitled to charge for it on the basis of "measured additions". It would seem, however, that they are entitled to some remuneration as the re-measuring of all the work was the direct result of the variations ordered by the Respondent company or its Architects, Graham Associates Ltd. (who had also made the contract with the appellants).

The fact that the appellants were expecting to be paid at the same rate for work which would have to be re-measured was made abundantly clear to Graham Associates Ltd. in a letter dated 21st February, 1956 (Exhibit 3a) and in a further letter dated 13th June, 1956, to Mr. P. P. Kerr-Jarrett (Exhibit 3i). It can therefore be said that the respondent company with its eyes wide open as to its liability for additional fees to the Quantity Surveyors proceeded to authorise very substantial variations of the original contract. The evidence shows it would be very difficult, if not impossible, to draw a clear and distinct line between such portions of the work as were done according to the original contract and those portions that were subject to variations of one kind or the other as the variations seem to have been done from day to day and all over the place.

This state of affairs was clearly not visualised by either party to the contract and clause (d) cannot be said to cover the situation when viewed in its totality. It is equally clear that the work done by the appellants was done at the request of the respondent company whose site architect, Mr. A. Dougall, was present all the time that the surveyors were re-measuring the work. Mr. Oswald's evidence was that Mr. Dougall and himself discussed the variations and Mr. Dougall never queried any of the re-measurements. The respondent company had the benefit of the labour of the appellants. It would seem, therefore, that the appellants are entitled to recover on a *quantum meruit*.

Learned Counsel for the appellants in the course of his submissions to us referred to *Sir Lindsay Parkinson & Co. Ltd. v. Commissioner of Works and Public Buildings (1950) 1 All E. R. 208*, which is a leading case on the principles of *quantum meruit*:

This was a case on a building contract in which there had been a large increase in the work performed subsequent to the

original contract and a deed of variation. The head note in the report referred to accurately sets out the judgment of the Court of Appeal, and I need do no more than quote therefrom:

> It was held: "on the true construction of the deed of variation it was not within the contemplation of the parties at the time of the execution of the deed that there would be such large increases in the amount of work to be executed; — and the additional work having been performed by the contractor at the request of the commissioners, he was entitled to be paid a reasonable profit or remuneration in respect of it";

and I cite the following passage from the judgment of Cohen L. J. at page 224 —

> "The work executed so far exceeded the stipulated work, that is to say, the work comprised in the original estimate of £4 million that it seems to me, to use the language of Counsel for the commissioners, fantastic and absurd to suppose that such a large increase as, in fact, occurred was within the contemplation of the parties when the deed of variation was executed. We are, I think, amply justified (a) in reaching the conclusion that the basis of the varied contract was that the quantum of work which the commissioners were entitled to require was work measured approximately by the said sum of £5 million, and (b) in implying a term that the Commissioners should not be entitled under the contract to require work materially in excess of that sum. It follows that such excess work having been done by the contractor at the request of the Commissioner, the Commissioners are liable to pay the contractor reasonable remuneration therefor."

Learned Counsel for the respondent company conceded that if this Court was of the opinion that the nature and extent of the variations that arose, created a new situation, not within the contemplation of the parties when the contract was entered into, the appellants would be entitled to remuneration on a substituted contract on a *quantum meruit* basis. He also said that in these circumstances the Court could properly treat the letter from the appellants to Mr. Kerr-Jarrett (exhibit 3i) as an offer from the appellants to the respondent company to adjust the variations for a fee to be based upon the amount of the

work which had to be measured and that by accepting the appellants' work for the purpose of the final adjustment of prices etc. with Higgs & Hill the respondent company would be liable to pay the appellants a reasonable fee. The only question which would then arise would be what was fair and reasonable.

Mr. Blake joined issue with Mr. Coore in what was fair and reasonable in the particular circumstances. Mr. Blake submitted that the nature of the work performed by the contractors was partly civil engineering and partly architectural, and he drew to our attention the evidence of Mr. Oswald who had stated that the fee laid down by the Royal Institute of Chartered Surveyors for quantity surveying services was 1¼ per cent in civil engineering contracts as against 2½ per cent for purely architectural contracts. He submitted that a reasonable fee would lie somewhere between these two and suggested something under 2 per cent.

Mr. Coore, on the other hand, had suggested 2½ per cent in the Court below, but before us he modified this by suggesting that the fee set out under clause (a) of the contract re bills of quantities viz. 2½ per cent in the first £20,000 and 2 per cent on any balance above, would be acceptable.

In view of the fact that it is impossible for this Court to draw a dividing line between such portions of the work which would qualify for a fee under clause (d) of the contract and the portions which would qualify on a *quantum meruit* basis, I am of the opinion that the only fair and reasonable basis for pricing the work will be on the basis agreed to by the parties for work performed under clause (a) referred to in the preceding paragraph. The appellants are therefore entitled to recover 2½ per cent on £20,000 — £500. 0. 0 and 2 per cent on £48,742, £974. 16. 9. Total £1,474. 16. 9.

In view of my findings in favour of the appellants on the main ground of appeal, it is not necessary for me to deal at any length with the ground of appeal relating to the learned trial Judge's refusal to admit evidence as to the technical meaning of the words "measured additions" or "additions" appearing in clause (d) of the contract. This aspect of the appeal has been dealt with very fully by my learned brothers. It is sufficient to say that I think the learned Judge was wrong to refuse

to admit the evidence. In his written judgment at page 50 of the record the Judge states:

> "The Court ruled that this evidence was not admissible on the ground that the language was clear and unambiguous on the face of it, and the Court was not satisfied that the parties did not intend to use them in their ordinary sense. In the circumstances, oral evidence intended to vary the terms of a written contract could not be admitted."

Nowhere in the evidence, nor in the submissions by learned Counsel to the learned Judge does it appear that the appellants were seeking to introduce evidence to show that the words were not to be given their ordinary grammatical meaning, albeit that it was a technical meaning – nor was there any suggestion that the technical meaning as such would vary, contradict or qualify the terms of the written contract. Furthermore, the contract was one made between the appellants as quantity surveyors and Graham Associates Ltd. who were the respondent company's architect (acting on behalf of the respondent) and if technical words were used in the contract, which one would expect professional bodies such as surveyors and architects to employ, the learned Judge should have admitted the evidence to explain the technical meaning and if the technical meaning varied or contradicted the ordinary grammatical meaning he would then have been in a position to say whether or not the technical meaning was the one intended by the parties to apply.

It was impossible for the Judge to consider the evidence until he knew what it was. I direct attention to *Shore v. Wilson (1842) 9 Cl. & F. 355* at p. 512 where Erskine J. says:

> "First, if the words used be technical terms of law, the Court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense; Secondly, whether they are technical terms of law or words of ordinary use, the Court may give them a more enlarged or more limited construction, whenever it is found that they cannot otherwise be applied at all; and therefore ***in all cases even where the words are in themselves plain and intelligible,*** and even where they have a strict legal

> meaning, *it is always allowable, in order to enable the Court to apply the instrument to its proper object, to receive evidence of the circumstances* by which the testator or founder was surrounded at the date of the execution of the instrument in question, not for the purpose of giving effect to any intention of the writer, not expressed in the deed, but for the purpose of ascertaining what was the intention evidenced by the expressions used; to ascertain what the party has said; not to give effect to any intention which he has failed to express."

The appellants having succeeded on their main ground of appeal for the reasons heretofore stated, the appeal will be allowed and in place of the judgment entered in the Court below in favour of the appellants for £566. 6. 0 there will be substituted judgment in their favour for £1,474. 16. 9, together with the appropriate costs in the Court below and the costs of this appeal.

Appeal allowed with costs. Judgment in the Court below set aside, and judgment entered for the plaintiff for £1,474.16.9.

Solicitors: *Judah & Randall* for appellants and *Clinton Hart & Co.* for the respondents.