



1938

BETWEEN:

Nov. 15 & 16

MURRAY BROWNSUPPLIANT;

1939
May 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Contract for architect's services—Termination of contract by the Crown before fulfilment—Damages for breach of contract.

Suppliant was engaged by respondent to prepare plans and specifications and to supervise the construction of a proposed Postal Station in the City of Toronto "on the attached terms and conditions on which outside architects are being engaged by this Department." One of these terms was that the total fee for all services rendered should

be five per cent of the actual cost of the building, as should be determined by the Department of Public Works. The contract price for the erection of the building was \$149,229. The actual cost was \$145,529.05. Upon completion of the plans and specifications suppliant was paid two and one-half per cent of the contract price, in accordance with the practice of the Department. Later suppliant was advised that his services to supervise the work would not be required, and that he would be paid 2½ per cent for the preparation of the plans and specifications, and ¼ per cent for the preparation of the necessary detail drawings, both payments to be based on the amount of the lowest tender, namely, \$149,229. Suppliant now claims remuneration based on the Schedule of Professional Charges of the Ontario Association of Architects, less the payment received by him.

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Held: That the contract entered into between suppliant and respondent was not divisible; it required the suppliant to prepare the plans and specifications and to supervise the construction of the building, and also to perform other duties.

2. That suppliant was not a public servant, or one in the service of the Crown; the relations between suppliant and respondent were contractual.
3. That suppliant did not acquiesce in the termination of the contract.
4. That suppliant is entitled to recover an amount equal to 5 per cent of the actual cost of the building less a certain amount he would have had to pay an inspector, agreed to be employed at his own expense, and less a further sum in respect of certain responsibilities and contingent liabilities which he would have had to bear had the contract been fulfilled.

PETITION OF RIGHT by the suppliant herein claiming damages for alleged breach of contract.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

P. E. F. Smily, K.C. for suppliant.

John Jennings, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (May 26, 1939) delivered the following judgment:

In 1935, under the provisions of the Public Works Construction Act, 1934, and The Supplementary Public Works Construction Act, 1935, the Governor in Council determined upon the construction of a post office building in the City of Toronto, known as Postal Station K. The Minister of Public Works was charged with the execution of this work, and parliament made the necessary appropriation therefor.

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In July, 1935, the suppliant, Mr. Murray Brown, an architect practising in the City of Toronto, a member of the Ontario Association of Architects, was asked by the Chief Architect of the Department of Public Works, by letter, if he would prepare the plans and specifications and supervise the construction of the proposed Postal Station K, "on the attached terms and conditions on which outside architects are being engaged by this Department." One of such terms and conditions was that the total fee for all services rendered should be five per cent of the actual cost of the building, as should be determined by the Department of Public Works, and this fee was to include various mentioned services to be performed, such as the preparation of the plans and specifications, the detail drawings, and the testing and inspection of all material entering into the construction of the building.

The suppliant, by letter, agreed to prepare the plans and specifications, and supervise the construction of the proposed building, "in accordance with the terms and conditions on which outside architects are being engaged by your Department." On the recommendation of the Chief Architect, and the Deputy Minister of Public Works, the services of Mr. Brown were engaged, and this recommendation was approved by an Order of the Governor in Council.

The suppliant in due course proceeded with the preparation of the plans and specifications of the proposed building, the cost of which he estimated at \$180,000. In September, 1935, on completion of the plans and specifications, he rendered an account to the Department of Public Works for one-half of his fee, \$4,500, that is 2½ per cent of \$180,000, which amount the account stated was then due, and later he was paid \$2,000 on account. In the meanwhile tenders had been solicited for the construction of the proposed building, the lowest of which was \$149,229, and this tender was accepted. In February, 1936, the Department paid Mr. Brown an additional sum of \$1,730.73, making \$3,730.73 paid him altogether, the same being 2½ per cent of the contract price of \$149,229. Apparently it was the practice of the Department to pay to outside architects engaged by it one-half of the stipulated fee upon completion of the plans and specifications

of any proposed building, and this would seem to be the practice among architects.

In May, 1936, the Chief Architect advised the suppliant, by letter, that the Department had decided to appoint a Clerk of Works to supervise the construction of the Postal Station, and that his services to supervise the work would not be required. And he was advised, at the same time, that he would be paid $2\frac{1}{2}$ per cent for the preparation of the plans and specifications, and $\frac{1}{4}$ per cent for the preparation of the necessary detail drawings, both payments to be based on the amount of the lowest tender, namely, \$149,229, less payments previously made to him. The suppliant acknowledged receipt of this letter and enquired on what basis the $\frac{1}{4}$ per cent was arrived at, "as the Quebec Schedule of fees calls for this to be 20 per cent of the fee which would be 1 per cent." The Chief Architect replied that it was the practice of the Department to pay outside architects $2\frac{1}{2}$ per cent for the "preparation of plans and specifications ready for tenders," under the Public Works Construction Act, and $\frac{1}{4}$ per cent for the preparation of detail drawings. No further communications passed between Mr. Brown and the Department in respect of the termination of his services. The suppliant was later paid \$373.08 for the preparation of the detail drawings, made at the request of the Department, that amount being $\frac{1}{4}$ per cent of the contract price, which payment Mr. Brown accepted, though questioning its sufficiency. The Department took the position that this was the fee paid for such work to other architects in private practice.

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In March, 1937, the suppliant rendered an account to the Department of Public Works in which he claimed a fee of \$7,162.99 for the sketch plans, working drawings and specifications, and some other items, based on the Schedule of Professional Charges of the Ontario Association of Architects, aggregating in all \$7,550.99, less the payment of \$3,730.73 already received by him, and this account the Department declined to pay. The suppliant's claim then passed into the hands of his solicitor, and later this petition followed. Before passing on I might say that the contract price for the construction of the Postal Station was reduced by \$4,500 by reason of the substitution of reinforced concrete construction for steel construction.

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Apparently the suppliant visited the building almost daily during construction, and advised the contractor in the interpretation of the plans and working drawings, during the construction of the building, but he did not advise the Department that he was doing this, though possibly the Department's supervising architect resident in Toronto had knowledge of it. However, the suppliant was very frank in stating that he rendered such assistance to the contractor voluntarily and because of his sentimental interest in a building he had designed, and the plans and specifications of which he had prepared, and he is not now putting that forward as a claim against the Department, and consequently this does not call for any further discussion.

The suppliant contends that a contract was entered into, on terms, between the Crown represented by the Department of Public Works and himself, to prepare the plans and specifications and to supervise the construction of the building, which contract the suppliant was willing at all times to carry out, and that the Department of Public Works had not the right to alter the terms of the contract, or to terminate it; and by reason of the breach of the contract the suppliant by his petition now claims damages in the sum of \$3,357.64, or, in the alternative, a fair and reasonable compensation for the work actually done and services rendered by him, in accordance with the Schedule of professional charges of the Ontario Association of Architects. The alternative claim I do not propose to entertain and shall not again refer to it. On behalf of the Crown, it was conceded by Mr. Jennings that a contract was entered into between the parties for the performance of the services and duties mentioned, but, it is claimed, that the professional services of the suppliant were retained as any other public servant or employee of the Crown is retained, and which services might be terminated by the Department at any time; that the suppliant acquiesced in the termination of the contract; and that the contract was a divisible one, which, I assume, is intended to mean that the preparation of the plans and specifications was one thing, and the supervision of the construction of the building another thing.

It is hardly open to debate, I think, but that here a contract was entered into between the Department of

Public Works and the suppliant, and which contract was authorized by the Governor in Council. Neither is there room for debate for the proposition that the Crown is liable in damages for a breach of contract, just as is the subject, and I need not pause to make reference to the authorities supporting that proposition. And I cannot think it arguable that the contract here was a divisible one. The terms and conditions of the contract required the suppliant to prepare the plans and specifications and to supervise the construction of the building, and to perform other duties as well. It probably was the understanding, though it is not specifically mentioned in the terms and conditions which accompanied the offer of the Department, that the suppliant was to be paid one-half of his stated remuneration upon the completion of the plans and specifications, which appears to be the practice in such cases, and which would seem to be a very just and reasonable practice; the parties to the contract seem to have expected that such a payment would then be made, but that is in respect of remuneration, and does not make the contract a divisible one. I do not think there is substance in this contention. Neither do I think that the suppliant stood in the relation of a public servant or employee to the Crown, and therefore a line of cases referred to by Jennings are not here applicable. Their relations were contractual. The suppliant contracted to perform certain services but that does not make him a public servant, or one in the service of the Crown, in the popular or legal sense. I see no distinction between the position of the architect of a building, the suppliant here, and the contractor who constructs it, and I can hardly conceive of the latter being designated as a public servant, and whose contract might be terminated, with or without cause, on the ground that being a public servant his contract might be terminated at any time.

At the conclusion of the trial I was rather strongly inclined to the view that the suppliant must fail on the ground that he had acquiesced in the termination of the contract, but upon a further consideration of the matter I feel compelled to depart from that view. I have since considered the important portions of the evidence, particularly that of the suppliant, and I find nothing therein

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that on any fair construction can be described as acquiescence on the part of the suppliant in the termination of the contract, or as a waiver of his legal rights thereunder. It is true that he made no formal protest to any officer of the Department of Public Works when advised that his services would not be required for supervising the construction of the building. It is also true that thereafter he prepared the detail drawings, or shop drawings, at the request of the Department, and for which he was paid, but I do not think it can be said that this constitutes acquiescence in the termination of the contract. It might as fairly be said that this constituted a resumption of the contractual relations between the Department of Public Works and the suppliant, and a cancellation of the notice to terminate the contract. It was a part of the work he was to perform under the contract. The fact that the suppliant rendered an account for work actually done and services rendered, not according to the terms of the contract, but according to the schedule of fees laid down by the Ontario Association of Architects, does not constitute acquiescence in the breach of the contract, though it is a recognition of the fact that the contract had been ended. It was because the contract was ended that this account was rendered, and on a basis of remuneration different from the terms provided by the contract, which, I think, cannot be supported, but that does not destroy the legal rights of the suppliant. Upon a careful consideration of the evidence I do not think it can be said that the suppliant acquiesced in the termination of the contract, or that he waived his rights thereunder. It would be rather unusual that he would so lightly assent to this. Contract rests on the agreement of the parties; as it is their agreement which binds them, so by their agreement they may be loosed. I do not think the suppliant ever agreed to discharge the contract. I think therefore the suppliant must succeed.

Now, as to the amount of damages to which the suppliant is entitled, and the basis for the assessment of the same. The suppliant was to be paid a fee of 5 per cent upon the actual cost of the building, which amount was to be determined by the Department, and which amount was finally determined to be \$145,529.05. The rule of the common law is, that where a party sustains a loss by

reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The suppliant agreed he would employ, at his own expense, an inspector who should be on the work continuously during all working hours, and during the construction of the building, and that he should test and inspect all material entering into the building. This would have necessitated, so far as the evidence informs me, an expenditure of \$1,325 and a deduction from the stipulated remuneration must be allowed in that amount. I make the total fee that would have been earned by the suppliant if the contract had been fully performed to be \$7,276.45, from which there must be deducted the amount already paid, \$4,103.81, and the sum of \$1,325 just mentioned, leaving a balance of \$1,847.64, which would have been paid to and received by the suppliant had the contract been fully performed. Further, by reason of the termination of the contract the suppliant was relieved of certain responsibilities and contingent liabilities, for which, I think, some deduction should be made, but that, in all the circumstances of this case, should not be any large amount, and this I fix at \$200. I therefore find that the suppliant is entitled to damages in the sum of \$1,847.64. If it should transpire that my calculations upon the foregoing basis are in any way in error the same may be adjusted on the settlement of the minutes of judgment. The suppliant will have his costs of the petition.

Judgment accordingly.

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