H. E. Carson & Sons Ltd. v. City of Moncton[1]: Statutory Enforcement As A Limitation To Restitutional Entitlement

CASE SUMMARY

Agents of the appellant municipality orally agreed with the President of the respondent company to have the company perform certain work to repair a backed up sanitary sewer. Liability for payment for the work was to be based upon a determination of an agent of the municipality as to which of the parties was responsible for the sewage back-up. Upon completion of the work, the city denied any liability to pay. It alleged that the company was initially responsible for the back-up and alternatively that the contract between the parties did not conform with the formalities prescribed by the *Municipalities Act*,[2] particularly that provision requiring the corporate seal of the municipality and the signatures of the mayor and the clerk be affixed to any contract to render it enforceable against the city. At trial it was found that on the balance of probabilities the company could not be held responsible for the initial damage to the sewer. Further, it was held that the portion of the *Municipalities Act* relied upon by the city could not be read so as to require that every emergency would necessitate a meeting of City Council to ensure compliance with the provision's formalities. Hence judgment was directed for the company. On appeal, the Court of Appeal of New Brunswick reversed the decision of the trial judge and found the contract to be unenforceable against the city. Provisions of the *Municipalities Act* requiring particular contractual formalities to be observed are imperative and the result of failure to comply with such provisions is unaffected by the fact that the contract in question is executed and the municipal corporation has received the benefits thereof.

BACKGROUND

At common law, a municipal corporation could not be held liable on a contract which did not bear the corporate seal.[3] This rule of general application however had, as early as 1852, been so considerably relaxed that a parol contract could be enforced against a municipal corporation where the objective of the contract was within the corporation's purposes and the corporation had accepted the benefits derived from the agreement.[4]

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[1](1982), 42 N.B.R. (2d) 130, (N.B.C.A.).

[2]R.S.N.B. 1973, c. M-22, s.5(2).

[3]Rogers, *The Law of Canadian Municipal Corporations, Vol. 2* (2d ed.), (Toronto: Carswell Co., 1971), at p. 1039.

[4]See *Clarke v. Cuckfield Union* (1852), 21 L.J. 349., (Q.B.).

The resilience of the common law in respect of required contractual formalities, such as the affixing of the corporate seal, was not reflected in judicial interpretation of legislatively prescribed formalities.

Statutory provisions as to requirements necessary to bind a municipal corporation in contract have consistently been held to be mandatory rather than directory. The leading authority on the matter of legislatively designated formalities, such as the corporate seal, is the decision of the House of Lords in *Young v. Leamington Corp.*[5] In that case the plaintiff had performed work pursuant to a contrct not under seal and claimed between £6000 and £7000 as the balance due under the contract. The municipality resisted the claim on the ground that the contract bore no seal. Section 174 of the *Public Health Act* provided that:

> Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.[6]

The Law Lords dealt with the issue of whether the defendant corporation could be held liable at common law under the contract and in so doing considered the rather unsettled nature of the rule requiring contracts to be under seal to be enforceable against a municipal corporation. However they unanimously agreed that the matter before them was one of statutory construction only. Lord Blackburn reproduced in his judgment the following excerpt of the reasons of Lindley L.J. in the Court of Appeal:

> In support of this contention cases were cited to shew that corporations are liable at Common Law quasi ex contractu to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament . . . contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them.[7]

The contract was held to be unenforceable against the municipality despite the fact that the work under it has been completed and accepted by it. Addressing the hardship such a decision would seem to occasion upon the appellants, Lord Blackburn found:

> It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship.[8]

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[5](1883), 8 App. Cas. 517.

[6]*Ibid.*, at 524.

[7]*Ibid.*, at 522.

[8]*Ibid.* at 522. Lord Bramwell in a concurring judgment expressed no sympathy for the appellant contractor; "I must add that I do not agree in the regret expressed at having to come to this conclusion . . . The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." p. 528.

The view expressed in *Young v. Leamington Corp.* as to the imperative nature of legislative provisions as to formalities in contracts involving municipal corporations has been adopted in various Canadian courts.[9] The policy basis of the case even goes beyond instances involving statutorily prescribed formalities.[10]

In the 1954 decision of the Supreme Court of Canada in *Deglman v. Guaranty Trust & Constantineau*[11] the remedial principle of restitution was recognized as part of the law of Canada. It may be remembered that the nephew in *Deglman* undertook to do certain chores from time to time for his aunt during her lifetime in return for which the aunt promised to will him a house. After her death it was discovered that the nephew had not been devised the property. The primary question for the Court to resolve was whether the nephew was entitled to any recompense from his aunt's estate for his services when the alleged contract for the transfer of land was not in writing as required by the *Statute of Frauds*. The Supreme Court of Canada was of the opinion that the nephew was entitled to remuneration for his services on a *quantum meruit* basis despite the fact that he could not enforce any contract in respect of the house for want of compliance with the *Statute of Frauds*. The Court distinguished between recovery upon a *quantum meruit* basis and recovery upon a contractual basis and found that the *Statute of Frauds* could only be held to defeat the claim in contract;

> On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.[12]

The distinction made by the Supreme Court of Canada in *Deglman* in the juristic basis of a claim in contract and a claim in the nature of restitution would seem to be of particular significance to the case under study. While *Deglman* has been acknowledged and accepted by the New Brunswick Court of Appeal[13] it found no mention, much less application in the instant case.

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[9]See *United Trust Co. v. Chilliwack* (1896), 5 B.C.R. 128, (B.C.S.C.); *Pooler v. Municipal District of Patricia*, [1934] 3 W.W.R. 754 (Alta. S.C.) in respect of the corporate seal. But see also *Parker v. Lion's Head P.S. Board*, [1934] O.R. 14, [1934] 1 D.L.R. 430, (Ont. C.A.); *McMurray v. East Nissouri P.S. Board* (1910), 21 O.L.R. 46, (Ont. D.C.). in respect of the requirement that the contract be in writing. And *Waterman-Waterbury Manufacturing Co. v. Slavanka School District* (1929), 23 Sask. L.R. 338, (Sask. C.A.) in respect of the requirement that business be transacted at a regular or special meeting.

[10]In *Silver's Garage Ltd. v. Town of Bridgewater*, [1971] S.C.R. 577, it was found by the majority of the Court that ". . . the fact that there is no provision for the formality of a by-law in this regard does not mean that no formality whatever is required or that the business of the inhabitants, by whom the town councillors are elected, can be conducted at the whim of individual councillors or town employees." per Ritchie J. at p. 587-88.

[11][1954] S.C.R. 725.

[12]*Ibid.*, at 728, *per* Rand J.

[13]See *City of Moncton v. Stephen* (1956), 5 DLR (2d) 722 and *Voutour v. Hoyt Estate* (1971), 3 NBR (2d) 671.

THE PRINCIPAL CASE

Section 5(2) of the *Municipalities Act* provides that:

> 5(2) Except as provided by regulation, no agreement, contract, deed or other document made or issued after January 1, 1967 to which a municipality is a party has any force or effect unless it is
> (a) sealed with the corporate seal of the municipality, and
> (b) signed by the major and the clerk.[14]

In the *Carson* case, the New Brunswick Court of Appeal found the denial of liability by the municipality based upon this provision to raise a "serious and far reaching issue".[15] There was some question as to the terms of the oral contract and it was found that:

> At most, the company had an oral agreement with city officials to do work which the city had power to do or to have performed by others under contract . . .[16]

Despite acceptance by the Court of the existence of an agreement and further recognition that the company had "at least a moral claim to be paid for its services",[17] it was decided that the company could not recover due to the statute-induced unenforceability of the contract.

In reaching its decision, the Court relied substantially upon portions of *The Law of Canadian Municipal Corporations* (2nd ed) by Rogers.[18] Statements in Rogers' treatise to the effect that statutory requirements as to contractual formalities are imperative to make a contract binding upon a municipality and are uneffected by common law exceptions to such requirements were cited with approval. Canadian authorites, recognized by Rogers in support of these propositions and dealing with analagous situations, were also considered[19] and lengthy passages from Lord Blackburn's judgment in *Young v. Leamington Corp.* concerning the policy considerations relevant in construing provisions of the nature with which the court was dealing were reproduced.[20]

The tenor of the decision was aptly reflected in the consideration of the effect of the municipality's receipt of the benefit of the oral agreement. The Court held that:

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[14]*Supra*, footnote 2.

[15]*Supra*, footnote 1, at 135.

[16]*Ibid*, at 135.

[17]*Ibid*, at 135.

[18]*Ibid*, at 135, *et seq*. See also footnote 3.

[19]Particularly *United Trust Co. v. Chilliwack*, *supra*, footnote 9 and *Pooler v. Municipal District of Patricia*, *supra*, footnote 9.

[20]See footnotes 7 and 8.

> In view of s. 5(2) the city is in a different position from business and other corporations where slight circumstances may bring into operation the doctrines of acquiescence and estoppel.[21]

The Supreme Court of Canada's decision in *Silver's Garage Limited v. Town of Bridgewater*[22] was relied upon in support of this finding. Statements in that judgment, quoted at the conclusion of the decision of the Court of Appeal, provided a terse warning to parties dealing with municipalities:

> Municipal corporations are the delegates of government to perform the duties and exercise the functions imposed by statute upon them as trustees for the inhabitants of a defined locality and as I have already stated individuals dealing with them must at their peril ascertain that the statutory body which assumes to delegate important functions involving the exercise of discretion to committees or persons has in fact the power so to delegate and that the particular person dealt with is acting pursuant to due authority so lawfully delegated.[23]

ANALYSIS

The policy reasons for construing statutory provisions such as s.5(2) of the *Municipalities Act* as imperative rather than directory is apparent in the judgment in *Carson*. Protection of the citizen from the unauthorized depletion of municipal coffers has long been the judicially perceived legislative intention behind the enactment of these types of provisions. *Carson* however contains policy considerations which militate toward allowing the company to recover for the services it had rendered.

It was acknowledged by the Court of Appeal that the company had at least a 'moral claim' for payment. There can be little doubt that the municipality had been enriched at the expense of the company by retaining the benefits of the company's labours without paying for them. Passages in *Deglman* indicate that rights derived from a situation of unjust enrichment are independent from contract. Logically therefore, the relevant provision of the *Municipalities Act* should have no effect upon the company's right to recover on a restitutionary basis.[24]

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[21]*Supra*, footnote 1, at 139.

[22]*Supra*, footnote 10.

[23]*Ibid*, at 592-93, per Ritchie J., adopting the statement of Rogers J. in *Eastern Securities Co. v. City of Sydney*, [1923] 4 D.L.R. 717, at 721.

[24]This would appear so if the *Municipalities Act* and the *Statute of Frauds* (as in *Deglman*) are of analagous effect. In *Pooler v. Municipal District of Patricia, supra*, footnote 9, Ewing J. of the Alberta Supreme Court held the relevant portions of the statutes to be so different in effect that writing sufficient to statisfy the *Statute of Frauds* was insufficient to satisfy a provision of the *Municipalities District Act* (Alta) requiring a seal and certain signatures to be on a contract for the transfer of land. The latter provision was held to be a "peremptroy statutory requirement" for land transfer by the municipality while the former was characterized as a setting forth "conditions upon which an action may or may not be brought". . . . .see p. 759, *et seq.*

The fact that the company's moral claim for payment was insufficient to permit recovery for the services rendered provides a measure of insight into the scope of entitlement to restitution in situations such as the one under study. It has been suggested that the mere proof of *prima facie* restitutionary facts is inadequate to entitle a plaintiff to a restitutionary remedy.[25] In the instant case the Court was confronted with the competing interests of the municipal ratepayers and the unpaid contractor. If the facts provided a *prima facie* basis for the contractor's claim the protection of the interests of the municipal ratepayers, as legislatively prescribed, clearly furnished a counterbalance to that claim.

If restitution might be loosely described as a remedy for unjust enrichment, any consideration of restitution or a right thereto must focus on the "unjustness" of the enrichment.[25] When a party contracting with a municipality fails to observe legislatively enacted formalities designed to protect the interest of the community at large, is it unjust that that party is unable to recover for work it performed under the contract? While it is difficult not to sympathize with the plaintiff company in the present case, to allow recovery would be tantamount to stripping away the protection the statutory provision provides. To do so would be to begin relaxing a rule strictly observed for the benefit of many whereas to deny recovery occasions hardship on relatively few. On the balance, in *H.E. Carson & Sons Ltd. v. City of Moncton* it is the legislative intention to benefit the many which prevailed.

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[25]See G.H.L. Fridman "Reflections on Restitution", (1976) 8 *Ottawa L.R.* 156, particularly pp. 174-181, where the author suggests that the relationship between parties is critical to recovery on a restitutionary basis.

[26]In this context "unjustness" has possibly a wider scope than "immoral" and may become a calculated weighing of relative benefits and detriments in a particular disposition.

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