Re Municipal Spraying and Contracting Ltd: Building Contracts and *Quantum Meruit* Claims — *Peter Kiewit* Revisited

CASE SUMMARY

The petitioner contractor was engaged by the respondent government to do road construction work. The parties differed as to whether certain work ordered by the respondent fell within the scope of the contractual obligations. Originally, the petitioner declined to do the work, but later it acceded to the demands of the respondent. Subsequently, the petitioner brought a claim for this work. The Supreme Court of Newfoundland, Trial Division, held that the petitioner was entitled to recover on a *quantum meruit* basis for the work at issue. Where a party to a contract exacts performance which it has no contractual right to demand and which is rendered by reason of duress rather than as a compromise of an honest claim, the performing party is entitled to remuneration for such performance on a *quantum meruit* basis. *Re Municipal Spraying and Contracting Ltd.* 1978, No. C.B. 71 (Unreported).

BACKGROUND

It is common for alterations, requiring extra work on the part of the performing party, to be made to the particulars of work in a building contract. The contract will usually stipulate a method of valuation of any extra work as well as any requirements precedent to recovery for the extra work such as an authorized certificate. The determination of the necessity of any alterations is most often the responsibility of a professional agent of the owner, i.e., an architect or engineer. A problem may arise when the parties disagree whether work ordered is within the purview of the contract and as a result authorization for extra-contractual recovery is refused. In an instance where the contract does not contain an arbitration clause or some provision by which the matter can be suspended for future settlement, the situation becomes quite difficult. While the dilemma is essentially interpretive in nature, its legal solution goes beyond the mere establishment of the contractual obligations of the parties.

The matter of interpretative disputes in the building contract situation was considered by the Supreme Court of Canada in *Peter Kiewit Sons' Co. of Canada Ltd.* v. *Eakins Co. Ltd.*[1] In that case, the dispute was focused upon a sub-contract which incorporated terms of the main

[1][1960] SCR 361.

contract giving the owner's engineer the authority to order alterations in work. The engineer's decision was final and his written order was a condition precedent to recovery for any extra work. Through an amendment by the engineer to the plans, the sub-contractor was instructed to drive piles to a greater depth than it thought was required under the original agreement. It also requested the 'over-driving' to be treated as an 'extra' which would entitle recovery beyond the original contract price. The engineer refused the request, maintaining the amendment was within the scope of the original contract. The main contractor felt bound by the engineer's opinion. The sub-contractor completed the work in accordance with the amended plans and later brought a claim in the alternative for damages for breach of contract or for compensation for the extra work on the basis of *quantum meruit*. At trial the action failed. On appeal, the British Columbia Court of Appeal held the sub-contractor to be entitled to remuneration for the whole job on a *quantum meruit* basis.

The Supreme Court of Canada reversed the Court of Appeal decision and restored the trial judgment. The majority found there to be no grounds upon which the sub-contract could be held inapplicable to the work in question. There was no consent to such effect. In addition, there was no supervening event or fundamental change in circumstance which would render performance impossible or radically different so as to justify an inference of frustration. Hence there could be no basis for the application of quasi-contract, and as a result any obligation to pay on the part of the main contractor had to be embodied in the sub-contract. In the opinion of the majority, the sub-contractor ought to have refused to complete the extra work. If performance without such completion was rejected, it ought then to have claimed damages for wrongful repudiation by the main contractor. The reasoning for such an approach was made clear:

> In the absence of a clause in the contract enabling it (sub-contractor) to leave the matter in abeyance for further determination, it cannot go on with performance of the contract according to the other party's interpretation and then impose liability on a different contract. Having elected to perform in these circumstances, its recovery for this performance must be accordance with the terms of the contract.[2]

The dissent of Cartwright, J. turned upon a different characterization of the situation. He found that the work in question was not within the ambit of the contract[3] and was performed, under protest, in circumstances of practical compulsion. On the basis of these determinations, he found the approach of the majority to be inappropriate:

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[2]*Ibid.*, per Judson, J. at p. 367.

[3]*Ibid.*, The majority found it unnecessary to determine whether the work in question was outside the contract. Their analysis of the facts dealt with the question of whether an obligation to pay for the work could be founded outside the contract. see pp. 366-69.

> To say that because in such circumstances the respondent (sub-contractor) was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous, the appellant (main contractor) may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character. . . .[4]

To avoid such an occurrence, Cartwright, J. thought it proper that an obligation be implied on the part of the main contractor to pay for the additional work which it ordered and from which it derived a benefit.

The *Kiewit* decision has found application in a variety of building contract cases. A delay which effectively transformed a summer project into a more costly winter project was held not to be a frustrating event which would bring performance outside an existing contract so as to provide the basis for a claim in *quantum meruit*.[5] In a case of a fundamental breach by an employer, it was decided that a contractor's failure to repudiate the contract limited his right to damages to the contract.[6] Where a dispute as to contractual terms arose during a construction project, it was held that the facts and terms of the contract, being not unlike those in *Kiewit,* bound the trial judge to allow the contractor no recovery beyond the contract.[7]

As a general proposition, benefits conferred under duress are recoverable, whether in the form of money, chattels or services.[8] In a leading Canadian authority on the point,[9] a vendor demanded that a purchaser pay more than the contract price for the transfer of certain lands. The purchaser who had entered into a binding agreement with another party in respect of the same lands was forced to pay the extra sum to protect his rights and to secure good title. The Supreme Court of Canada, relying on English authorities,[10] held, the vendor's belief that

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[4]*Ibid.*, p. 380.

[5]*Swanson Construction Co. Ltd.* v. *Government of Manitoba* (1963), 40 DLR (2d) 162 (Man. C.A.). See also *Electric Power Equipment Ltd.* v. *RCA Victor Co. Ltd.* (1963), 41 DLR (2d) 727 (B.C.S.C.).

[6]*Morison-Knudsen Co. Inc. et al.* v. *British Columbia Hydro and Power Authority* (No. 2), [1978] 4 W.W.R. 193 (B.C.C.A.). The contractor in this case did not become aware of the employer's fundamental breach until after performance was complete and therefore never had an opportunity to repudiate the contract. The lack of an effective election did not influence the application of *Kiewit* by the Court and the award of damages by the trial judge in *quantum meruit* was consequently varied.

[7]*Modern Construction Ltd. et al.* v. *City of Moncton* (1970), 2 N.B.R. (2d) 442 (N.B.S.C.Q.B.). See also *Warren General Contracting Ltd.* v. *A.C. Mallet and Fils Ltee, et. al.* (1979), 27 N.B.R. (2d) 425 (N.B.C.A.) and *Industrial Construction* v. *Lake Side Center* (1978), 20 N.B.R. (2d) 321 (N.B.S.C.Q.B.). In the later case Stratton J. found *Kiewit* to be senior authority "which appears to require the strict interpretation of contract documents and strict adherence to contractual obligations", p. 324.

[8]Goff, R.; Jones, G. *The Law of Restitution* (2nd ed.) London: Sweet & Maxwell 1978, pp. 161-163.

[9]*Knutson* v. *The Bourkes Syndicate*, [1941] S.C.R. 419.

[10]The most recent of the English authorities considered was *Maskell* v. *Horner* (1915) 3 K.B. 106 which contains a good summation of the English law with respect to duress and submission to honest claims.

he was entitled to the additional money did not alter the fact that he was not so entitled. The position of practical compulsion, in which the vendor's demands placed the purchaser, was sufficient to allow the latter to recover the extra amount.

A further decision of the Supreme Court of Canada[11] clarified the meaning of "practical compulsion". A municipality demanded certain fees from a hospitalized landowner pursuant to a by-law which was later quashed. In an action to recover the fees, it was held that when alleging practical compulsion, it is not essential to show there was no other alternative. It is enough to show that by reason of time or feasibility, other alternatives were impossible as a matter of practicality and that the circumstances resulted in a compulsion of an urgent and pressing necessity.

THE PRINCIPAL CASE

In the instant case, the contractual work yielded about 80,000 yards of excess excavated materials. The employer instructed the contractor to use these materials for further construction which the employer contended was part of the contract work. The contractor disagreed, but complied with the instructions because of the employer's threat to have the work done by another company, the cost of which it would later claim from the contractor. In addition, the contractor received legal advice to the effect that it should perform. The work in dispute, by the trial judge's calculation, was an increase in the original contract of almost 70%. At no time during the contractor's performance was the contract between the parties repudiated.

Goodridge, J. found that despite the similarities between the case before him and *Kiewit,* the situations were "on proper analysis quite different".[12] The protest in *Kiewit* arose only after the sub-contractor encountered difficulty in complying with the new specifications whereas, in the instant case, the protest commenced when the contractor became aware of the directions to do the work in issue. It was found to be of significance that the work in question was not covered by the contract.[13] The dilemma facing the contractor in *Re Municipal Spraying* was held to

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[11]*Eadie* v. *Township of Brantford,* [1967] S.C.R. 573 see also *Municipality of Saint John, et al.* v. *Fraser Brace Overseas Corp.,* [1958] S.C.R. 263 and *George (Porky) Jacobs Enterprises Ltd.* v. *City of Regina,* [1964] S.C.R. 326.

[12]1978 No. C.B. 71 (Unreported) p. 16.

[13]This distinction may be tenuous inasmuch as the question of whether the work in issue was within the contractual obligations was not critical to the majority judgment in *Kiewit.* See footnote 3.

be different from that facing the sub-contractor in *Kiewit* in respect of the decision whether to perform or not.[14] In assessing that difference Goodridge, J. asserted:

> If an owner insists that a contractor do an act not clearly within its contract, and there is thereby imposed upon the contractor the necessity of making a decision, the prudent course for him to follow is to do the act and seek redress later. The owner is not adversely affected by either performance or non-performance. The contractor is adversely affected both by performance when it could not be lawfully imposed and non-performance where performance could not be lawfully withheld.[15]

The trial judge held that *Kiewit* was distinguishable on the facts. Therefore, he did not feel bound to find the contractor's performance had limited its recovery to the contract.[16] Consequently, the case was characterized as one of unjust enrichment. The duress which motivated the contractor's performance was held to be sufficient to negate any inference of volition. Since performance was involuntary, it could not constitute a submission to or compromise of the employer's honest claim so as to disentitle the contractor to quasi-contractual relief.[17] Recovery was awarded on a *quantum meruit* basis.

ANALYSIS

The statement of Goodridge J., with respect to the prudent course of action of a contractor in a position comparable to the one under study, is a contradiction of the remedy proposed by the majority in *Kiewit*. While the distinction between the positions of the contractor in the instant case and the sub-contractor in *Kiewit* is not entirely convincing, the approach is attractive. The treatment of the relevant considerations in the instant case is well reasoned and highlights the deficiencies of the *Kiewit* ratio in a general application to problems of this sort.[18] Clearly, the latter does not lend itself to an equitable analysis of situations in

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[14]The position of the respective parties was distinguished on the basis that in the instant case the work concerned was not covered by the contract, hence the contractor had the option of performing and suing "to recover its costs and a reasonable profit", p. 17. The relevance of the distinction may be questionable in light of the nature of the Kiewit analysis. See footnote 13.

[15]1978 No. C.B. 71 (Unreported) pp. 18-19.

[16]In finding the contractor was not limited only to recovery on the contract, the Court found portions of the judgment of Cartwright J. in *Kiewit* to be "a refreshing observation applicable to this case if not to that", p. 20.

[17]The Court found authority for this proposition in the English Court of Appeal decision in *Maskell* v. *Horner* (1915) 3 K.B. 106.

[18]See Duncan Wallace, in *Hudson's Building and Engineering Contracts* (10th ed.) London: Sweet & Maxwell 1970 p. 543 where the author indicates that the decision in *Kiewit* is probably right inasmuch as the severe variation clause incorporated in the sub-contract made the engineer's decision final. It was harsh in that if there had been good grounds for dispute, the sub-contractor was forced to elect before performance and run the risk of being wrong.

which duress or extra-contractual work are of significance. The potential "unjust enrichment of a shocking character", which Cartwright J. feared the majority decision in *Kiewit* might countenance in certain circumstances, can be readily perceived in the factual situation in *Re Municipal Spraying*.

Notwithstanding that it was distinguished upon the facts, the basic relevant principle underlying *Kiewit* is addressed in the judgment of Goodridge, J. In a situation where the interpretation of the contract is disputed, the inference that a contractor's performance is a submission to the interpretation of the owner or employer is the foundation of the proposition in *Kiewit* that performance is a bar to recovery beyond the contract. It was acknowledged in *Re Municipal Spraying* that submission to another's honest claim is a bar to recovery in quasi-contract. In deciding that the contractor's performance was *not* tantamount to such a submission, the Court effectively considered the same issue as in *Kiewit* but outside the frame of reference of the *Kiewit* decision.

If *Re Municipal Spraying* is rightly decided, it may provide recourse to a contractor which performs in the midst of an interpretive dispute. It would seem incumbent upon a contractor or sub-contractor which wishes to preserve an opportunity to contest, after performance, whether work is within the ambit of contractual obligations, to fulfill certain conditions. Firstly, the contractor would need to have drawn to the attention of its employer before the work in question was commenced, that the interpretation was disputed and to have maintained that position throughout performance. Secondly, the contractor would have to be able to establish that it had rendered performance by reason of duress. Whether 'practical compulsion' would satisfy the duress requirement is not clear in the ratio of the instant case. However, the authorities seem to substantiate such an inference. If a contractor is able to meet these requirements, then it would at least have an arguable case for the application of *Re Municipal Spraying* to its situation.

CONCLUSIONS

It is a trite observation that the *Kiewit* decision remains an influential authority in the law of building contracts; however, the parameters of that authoritative influence are quite obscure. While the instant case may delineate these parameters to a degree, it clearly indicates that in future considerations of the issue of performance and interpretive disputes in the building contract sphere, some emphasis needs to be placed on the voluntary aspect of the contractor's actions. Developments in the law with respect to duress, particularly under the epithet of 'practical compulsion', add merit to such a focus. Inasmuch as *Re Municipal Spraying* draws

attention to the inadequacies of an established precedent in application to a somewhat complex problem and provides direction for future consideration of that problem, it is a decision of value. Should its reasoning be judicially accepted as legally sound in the analysis of the problem under study, then it may well be a landmark decision.

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