1966

*Feb. 28
Mar. 1, 2
Oct. 4

THE STEEL COMPANY OF CANADA LIMITED (*Defendant*) ..... APPELLANT;

AND

WILLAND MANAGEMENT LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Roofing contract—Descriptions and specifications supplied by owner—Guarantee that work will remain weather tight—Damage caused by failure of material to perform intended function—Contractor's claim for compensation for repairs—Whether responsibility for results of using material rests upon owner who prescribed it or upon contractor who applied it.

The respondent company claimed compensation for work and services performed by it in repairing windstorm damage to three roofs which it had constructed on buildings owned by the appellant. Three separate tenders submitted by the respondent for the original work were made and accepted on the basis that the roofing, roof insulation and sheet metal work was to be done pursuant to descriptions and specifications which the appellant had forwarded to the respondent together with its invitation to tender. These descriptions and specifications were prepared by employees of the appellant company and contained complete details as to the materials and methods of construction to be employed which included the requirement that the insulating boards were to be attached to the steel sheeting on the roofs by the use of "Curadex or approved equal". The damage was caused by the failure of the Curadex adhesive to perform the function for which it was intended.

The specifications had also required the contractor to furnish a five-year guarantee that all the work specified would remain weather tight and that all material and workmanship employed would be first class and without defect.

The appellant resisted the respondent's claims on the ground that the repair work for which it claimed compensation was work which it was required to do under the terms of its guarantee, whereas the respondent contended that the guarantee did not require it to repair damage occasioned by the failure of material, which had been selected and specified by the appellant, to perform the function for which it was intended. At trial judgment was rendered in favour of the respondent and on appeal the trial judgment was affirmed by the Court of Appeal.

Held: The appeal should be allowed.

The Court was unable to accept the contention put forward on behalf of the respondent that "—under the circumstances the plaintiff guaranteed only that, as to the work done by it, the roof would be weather tight *in so far as the plans and specifications with which it had to comply would allow*".

* PRESENT: Taschereau C.J. and Martland, Ritchie, Hall and Spence JJ.

The word "work" as used in the guarantee was interpreted as referring to the completed work including the materials of which it was required to be composed and this construction was entirely consistent with the further guarantee required by the specifications that "all material and workmanship employed are first class and without defect". Curadex was a material selected by the appellant but it was one of the materials which the respondent agreed to employ in the work and which it thereby agreed to guarantee as "first class and without defect". The latter words were construed as meaning "first class and without defect" for the purpose of its intended use.

When a contractor expressly undertakes to carry out work which will perform a certain function in conformity with plans and specifications, and it turns out that the work so constructed will not perform the function, "generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specification. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty."

The agreement to furnish a written guarantee "that all work above specified will remain weather tight" for five years constituted at the very least an express undertaking to carry out work which would perform a certain function in conformity with plans and specifications and in accordance with the above-quoted principles, established by a long line of decisions, it followed that when a work so constructed does not perform the function which the contractor agreed that it would perform, the contractor is liable for the failure of the work and is not entitled to extra payment for repairing it so that it will perform the stipulated duty. *Thorn v. Mayor and Commonalty of London* (1876), 1 App. Cas. 120; *Jones v. The Queen* (1877), 7 S.C.R. (App.) 570; *Sansan Floor Co. v. Forst's Ltd.*, [1942] 1 D.L.R. 451; *Grace v. Osler* (1911), 19 W.L.R. 109, followed; *MacKnight Flintic Stone Co. v. Mayor, Aldermen and Commonalty of the City of New York* (1869), 160 N.Y. Rep. 72, disapproved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Hughes J. Appeal allowed.

B. Grossberg, Q.C., and *G.R. Dryden*, for the defendant, appellant.

John J. Robinette, Q.C., and *W. Schreiber, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—On the opening of this appeal an application was granted to change the name of the plaintiff-respondent from Schreiber Roofing Company (Ontario) Limited to Willand Management Limited in conformity with supple-

[1] *Sub nom. Schreiber Roofing Co. (Ontario) Ltd. v. Steel Company of Canada Ltd.*, [1965] 1 O.R. 410, 48 D.L.R. (2d) 212.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

mentary Letters Patent issued by the Provincial Secretary of Ontario on January 23, 1944.

This is an appeal from a judgment of the Court of Appeal for Ontario[1] affirming the judgment rendered at trial before Mr. Justice Hughes which allowed the claim of the respondent for compensation for work and services performed by it in repairing windstorm damage to three roofs which it had constructed on buildings owned by the appellant in the City of Hamilton.

In the spring of 1957 the appellant accepted three separate tenders submitted by the respondent for the "application of built-up roofing" on the sloping roofs of two of its new buildings. It is not disputed that these tenders were made and accepted on the basis that the roofing, roof insulation and sheet metal work was to be done pursuant to the "Descriptions and Specifications" which the appellant had forwarded to the respondent together with its invitation to tender. These "Descriptions and Specifications" were prepared by employees of the appellant company and contained complete details as to the materials and method of construction to be employed which included the requirement that insulating boards were to be attached to the steel sheeting on these roofs by the use of "Curadex or approved equal".

Curadex is an expensive fire resistant adhesive prepared by Currie Products Limited which had been used by the respondent on more than one occasion in constructing flat roofs for buildings of the appellant but which had not been previously used by either party in constructing sloping roofs.

The three separate windstorms which damaged the appellant's roofs were of a kind which was reasonably foreseeable in the Hamilton area and each of them had the effect of severing the insulating boards from the steel sheeting of the roofs constructed by the respondent. It was not disputed that at the time of these storms these roofs were not "weather tight" within the meaning of the guarantees which are hereinafter referred to and there are concurrent findings in the Courts below to the effect that the damage was caused by the failure of the Curadex adhesive to per-

[1] *Sub nom. Schreiber Roofing Co. (Ontario) Ltd. v. Steel Company of Canada Ltd.*, [1965] 1 O.R. 410, 48 D.L.R. (2d) 212.

form the function for which it was intended. The findings in this regard are summarized by Gale J.A. in the course of the reasons for judgment which he rendered on behalf of the Court of Appeal in the following passage:

> It was found by the learned trial judge that the cause of the damage was the failure of the adhesive (Curadex) to hold the roofing to the steel deck. He also found that the materials used by the plaintiff were those which the specifications required it to use; that there was no defect in the workmanship and that the materials were applied in the quantities and manner required by the specifications.

It accordingly appears to me that the question which lies at the heart of this appeal is whether the responsibility for the results of using Curadex rests upon the appellant who prescribed it or upon the respondent who applied it, and in this regard it seems to me to be of first importance to consider the circumstances under which this adhesive came to be included in the specifications.

In the course of preparing the specifications, Mr. L. Tweedie, who was in charge of the project for the appellant company, sought the advice of Mr. H. L. Schreiber, general manager of the respondent, who was a highly qualified expert on built-up roofing, as to the best method to be employed in the construction of the roofs in question. Mr. Schreiber spoke with great authority and in view of the experience he and his company had had in the use of Curadex as an adhesive on flat roofs, he must, in my view, be taken to have had knowledge of the properties and potential of this product as a wind resistant adhesive. In the course of his lengthy discussions with Mr. Tweedie and other members of the appellant company, Mr. Schreiber expressed a preference for the use of hot, stiff asphalt rather than Curadex for the sloping roofs which the appellant had in contemplation but having consulted with his associates in Detroit he made three separate tenders on behalf of his company pursuant to specifications which, as has been stated, required the use of "Curadex or approved equal".

The attitude of the respondent in this regard as expressed by Mr. Schreiber is best summarized in a passage from his cross-examination where he said:

> A. Let's put it this way: I preferred the use of asphalt, but if a customer saw fit to use Cur-Adex, I would go along, certainly, with whatever he saw fit.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

Q. You went along with this, and made your tender on these specifications? A. Yes, sir. This is what the Steel Company wanted me to tender on.

The invitation to tender in respect of each roof included the following paragraph:

If you are interested in this work please contact our Mr. Tweedie, visit the site; obtain drawings and submit your quotation in duplicate to this office.

It therefore appears to me that when he signed the tenders on behalf of the respondent, although he had had no actual experience in the use of Curadex on sloping roofs, Mr. Schreiber was, as the result of lengthy discussions with the appellant's officers and of his having previously used the product on flat roofs, fully aware of the factors necessary to enable him to decide whether or not this adhesive was a first-class material for its intended use, and whether it was one which his company was prepared to guarantee to remain "weather tight" for a period of five years.

The respondent's officials had the first specifications in their hands for three weeks before deciding to tender and it is to be presumed that during that period consideration was given to the terms of the paragraph of those specifications under the heading "Bond and Guarantee" which read as follows:

This Contractor is to furnish a written guarantee running for a period of five years, that all work above specified will remain weather tight and that all material and workmanship employed are first class and without defect. Terms of all guarantees shall begin at completion of the work. This contractor shall make good without charge all defects appearing within period named when requested in writing by the Owner.

The three guarantees which were eventually given sometime after the repairs had been completed, are made effective for five years from the date when the original work was finished and they therefore must, in my view, have reference to the roofs as they existed at that date and can have no relation to the very different structures which were produced as a result of the repairs.

In this regard, I disagree with Hughes J. when he says of the completely repaired roofs:

...it was these roofs which were referred to in the written guarantees which it (i.e. the respondent) eventually supplied in March 1958.

The appellant resisted the respondent's claim on the ground that the repair work for which it claims compensation was work which it was required to do under the terms of its guarantee, whereas the respondent contended that the guarantee did not require it to repair damage occasioned by the failure of material, which had been selected and specified by the appellant, to perform the functions for which it was intended.

I agree with Gale J.A. that "this case is to be decided simply by a common sense interpretation of that part of the guarantee which is under dispute" but unlike him I am, with all respect, unable to accept the contention put forward on behalf of the respondent that:

> ...under the circumstances the plaintiff guaranteed only that, as to the work done by it, the roof would be weather-tight *in so far as the plans and specifications with which it had to comply would allow.*

The italics are my own.

In accepting this contention, the Court of Appeal followed the reasoning employed by the New York State Court of Appeal in the case of *MacKnight Flintic Stone Co. v. The Mayor, Aldermen and Commonalty of the City of New York*[1] in which that Court was construing a contractor's guarantee which provided that the work done by the contractor was to be turned over to the City in perfect order and "guaranteed absolutely weather and damp proof for five years from the date of acceptance of the work. Any dampness or water breakage within that time must be made good by the contractor without any cost or expense to the City."

Gale J.A. found the issues in that case to be substantially the same as those in the present case and he adopted the following paragraph from the reasons for judgment of Vann J. who delivered the judgment for the New York Court:

> The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do the work according to the plan and specifications, and thus make the floors water tight *so far as the plan and specifications would permit.*

The italics are my own.

It will be observed that the acceptance of the interpretation placed by the Court of Appeal upon the guarantee

[1] (1899), 160 N.Y. Rep. 72.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

required by the specifications involves supplying the words "in so far as the plans and specifications with which it had to comply would allow" which are not contained in the guarantee itself. The five-year guarantee which was required to be given by all those tendering on the works in question included the stipulation "that all work above specified will remain weather tight ..." and in my view the words "all work above specified" mean the work described in the specification which included the employment of Curadex as the adhesive material to be used in attaching the insulating boards to the steel sheeting on the roofs in question. If any other adhesive material had been used by the contractor the completed work would not have been the "work above specified" which the respondent was required to guarantee.

I interpret the word "work" as it is used in the five-year guarantee as referring to the completed work including the materials of which it was required to be composed and this construction in my view appears to be entirely consistent with the further guarantee required by the specifications that "all material and workmanship employed are first class and without defect". It is true that Curadex was a material selected by the appellant but it was one of the materials which the respondent agreed to employ in the work and which it thereby agreed to guarantee as "first class and without defect". I think these latter words must be construed as meaning "first class and without defect" for the purpose of its intended use.

In construing the guarantee as he did, Gale J.A. was clearly influenced by the fact that he did not think that it would have been reasonable for the defendant to have expected, and the plaintiff to have given, an absolute guarantee against the elements when neither had had any experience with the capacity of Curadex to perform properly on the sloping steel deck.

In this regard it is, however, to be remembered that the respondent is an experienced contractor specializing in the roofing business and that it was bidding in competition with several other roofing contractors. Under these circumstances the language employed by Cockburn C.J. in

Stadhard v. Lee[1] which was quoted with approval in the Exchequer Court of Canada in *Jones v. The Queen*[2] appears to me to be particularly pertinent:

> It frequently happens, in the competition which notoriously exists in the various departments of business, that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and oppressive. From the stringency of such terms escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning. But the duty of a court in such cases is to ascertain and to give effect to the intention of the parties as evidenced by the agreement, and though, where the language of the contract admit of it, it should be presumed that the parties meant only to be reasonable, yet, if the terms are clear and unambiguous the court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

In construing the guarantee by supplying the words "in so far as the plans and specifications with which it had to comply would allow" it appears to me that the Courts below have tacitly accepted the proposition that no matter how experienced a contractor may be in a particular field, he nevertheless bears no responsibility for the employment of defective material in the work which he has undertaken, provided that it is a material which has been selected by the owner and included in the specifications. This proposition finds support in the judgment of Vann J. in the *MacKnight* case, *supra*, in a passage which was expressly adopted by Hughes J. which reads as follows:

> The defendant, (i.e. the owner), specifically selected both material and design and ran the risk of a bad result. If there was an implied warranty of sufficiency, it was made by the party who prepared the plan and specifications, because they were its work, and in calling for proposals to produce a specified result by following them, it may fairly be said to have warranted them adequate to produce that result.

I cannot accept this proposition which appears to me to run contrary to a long line of decisions in England starting with *Thorn v. The Mayor and Commonalty of London*[3] which have been followed in this country (see *Jones v. The Queen, supra, Sansan Floor Company v. Forst's Limited*[4], *Grace v. Osler*[5]), and the effect of which is summarized in part in Hudson's Building and Engineering Contracts, 8th ed., 1959, at p. 147 where it is said:

> Sometimes, again, a contractor will expressly undertake to carry out work which will perform a certain duty or function in conformity with

[1] (1863), 3 B. & S. 364.
[2] (1877), 7 S.C.R. (App.) 570 at 621.
[3] (1876), 1 App. Cas. 120.
[4] [1942] 1 D.L.R. 451 at 456.
[5] (1911), 19 W.L.R. 109 at 115.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

plans and specifications, and it turns out that the work constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specification. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty.

The agreement to furnish a written guarantee "that all work above specified will remain weather tight" for five years in my view constitutes at the very least an express undertaking "to carry out work which well perform a certain ... function in conformity with plans and specifications" and in accordance with the principles stated in the paragraph last above cited, I think that it follows that when a work so constructed does not perform the function which the contractor agreed that it would perform, the contractor is liable for the failure of the work and is not entitled to extra payment for repairing it "so that it will perform the stipulated duty".

In the course of his reasons for judgment, Mr. Justice Hughes expresses the following view:

> It would seem . . . that from this evidence that the defendant corporation was taking a calculated risk in specifying the adhesive designed and required to fasten the roofing membrane to a roof of new design and it would seem that they knew this to be the case.

In my opinion the evidence discloses that both parties were fully alerted to any limitations which may have attached to the use of Curadex as an adhesive on these roof decks and in view of the fact that neither of them had had any experience in using it on sloping roofs, I think that some risk was involved. This may have been the reason why the appellant required the contractors who were tendering on the work to provide the guarantee in question, but whatever the reason may have been, it appears to me that any risk involved in the undertaking was accepted by those who were prepared to tender in accordance with specifications which included the requirement of providing a written guarantee that all material employed in the work was first class and without defect, and that "all work ... specified" would remain weather tight for a period of five years.

1966

STEEL CO. OF CANADA LTD. v. WILLAND MANAGEMENT LTD.

Ritchie J.

In view of all the above I would allow this appeal and dismiss the action of the respondent with costs in this Court and in the Courts below.

Appeal allowed and action dismissed with costs.

Solicitors for the defendant, appellant: Levinter, Grossberg, Dryden, Rachlin, Bliss & Raphael, Toronto.

Solicitor for the plaintiff, respondent: William Schreiber, Hamilton.