

LENORE (C.O.B CANORE CONSTRUCTION) VS RIDDOCH (CONSTRUCTION CASE)

** Unedited **

Indexed as:

Leore (c.o.b. Canore Construction) v. Riddoch

Between

John Edward Leore, carrying on business as Canore

Construction, plaintiff, and

Edward J. Riddoch and Sherry Riddoch, defendants

[1997] O.J. No. 106

File No. 7435/91

Ontario Court of Justice (General Division)

Sudbury, Ontario

Cosgrove J.

January 6, 1997.

(12 pp.)

Building contracts — The contract — Plans and specifications — Interpretation — Breach — Completion — Delay — Payment, compensation to builder — Preparation of estimates — Evidence and proof — Extras — Whether extra work was done pursuant to the terms of the original contract — Determination of amount of compensation — Quantum meruit claims — Circumstances where doctrine not applied.

Action for damages under a construction contract; counterclaim by the defendants for failure to perform. The defendants approached the plaintiff contractor to build a house. The contractor prepared a written proposal, setting an upper limit of \$140,000 on the price of the house. Although the parties did not have a comprehensive written contract, construction began in April 1989. In June 1989, the defendants prepared a contract which was signed by the parties. The contract price was \$132,193 and the target date for completion was July 28, 1989. The house was not completed until September, until which time the defendants lived with friends and stayed in a motel. By November the defendants had paid \$131,658.55, but in January 1991 the plaintiff requested a further payment for extras and interest in the amount of \$71,236. The defendants denied the claim and alleged that they had overpaid by more than \$13,000. There was a dispute as to whether the contract stipulated a finished basement.

HELD: Action dismissed; counterclaim allowed. The document signed in June 1989 was a valid agreement between the parties, and the evidence suggested that it included a finished basement. The upper limit of \$140,000 as a price was binding on the plaintiff. Since the price was set by contract, the plaintiff could not rely on the doctrine of quantum meruit.

Counsel:

Richard A. Pharand, for the plaintiff.

D. Peter Best, for the defendants.

COSGROVE J.:—

Nature of Claim and Counterclaim

¶ 1 The plaintiff sought damages of \$71,816.13, interest at the rate of 1.5% per month from November 27, 1989, and punitive damages of \$50,000.00 in his Statement of Claim of July 15, 1991.

¶ 2 The defendants disputed the claim and counterclaimed for \$15,000.00 for damages for failure to complete work on time or for failure to perform.

¶ 3 The dispute arises from the construction of a house by the plaintiff for the defendants in 1989 in the Town of Walden in the Regional Municipality of Sudbury.

History of the House Construction:

¶ 4 In February, 1989, the defendants, who were teachers, approached the plaintiff, a contractor, to request him to build a house. After discussions with the defendants, the plaintiff prepared a written proposal for the house construction for a “Total Estimated Price” of \$140,000. The proposal was broken down as follows: main construction — \$92,000.00; double garage — \$20,000.00; and finished basement — \$28,000. The proposal was signed by the plaintiff and concluded with the following:

This is a realistic price for the building you desire. If you want to finalize the price with a contract, contact me. The price will not be any higher. Should you wish to modify the plans, feel free to contact me.

¶ 5 The defendants obtained architectural plans for the construction of the house which were changed after discussion with the plaintiff during March and April, 1989. On March 16, 1989, Mr. Riddoch, in the company of the plaintiff, applied for a Building Permit. The plans submitted to and approved by the Regional Municipality were introduced as an exhibit in the trial. Notwithstanding that there was no comprehensive

written contract between the parties, construction of the house was started in April of 1989. The defendants provided the plaintiff with a sample builder's contract (Bednarski agreement) and requested a written contract. The plaintiff wrote, signed and delivered the following note to the defendant, Mr. Riddoch:

I contacted my lawyer about signing another contract. He advises me not to sign anything. He advised me that he would be reluctant to represent me in any legal problems that could arise if I signed the second contract. He suggested another contract be drawn up with your totals for the various parts of the house that you wish to exceed the agreed on \$112,000.00 price. All in one piece of paper, I am sorry but we will have to discuss the matter in more detail.

¶ 6 During cross-examination, the plaintiff admitted that the bulk of the contents of this letter were untrue (viz, he had not discussed this with his lawyer and did not have a discussion with the defendant as contained in the note).

¶ 7 On June 16, 1989, the parties met and discussed the house under construction. The defendant typed a two-page contract which was signed by the parties. The contract was entitled:

Contract for the construction of a house, 204 Neimi Rd., Walden, between Sherry and Edward Riddoch, Lively, Ont. (Owners) and John Leore, 1327 North Shore Drive, Sudbury, Ont. (Builder)

¶ 8 The contract contained three columns described as Items, Cost of Materials and Labour Cost; the sub-totals for materials was \$65,648.00 and for labour, \$39,750.00, for a sub-total of \$105,398. The contract included the following as well:

Builder's Fee	\$10,540.00
Plumber	\$14,075.00
Garage drs. inst.	<u>\$ 2,180.00</u>

TOTAL	\$ 132,193.00
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Target date for completion — July 28, 1989.

¶ 9 The house, which was started in late April, 1989, was not completed by July 28, 1989, and the defendants (who had sold their previous home) lived with friends and stayed in a motel before moving into the house on Labour Day weekend. Construction ceased in November, but the defendants complained that various items such as the fireplace had not been finished. The defendants made a final payment to the plaintiff on November 27, 1989, of \$24,000.00 (part of a total expenditure of \$131,658.55 made by them either directly to the plaintiff or for house-related costs).

¶ 10 By letter dated January 15, 1991, by the plaintiff to the defendants, the plaintiff requested further payment of \$71,236.00 for construction of the house as follows:

Total owing minus all allowances	\$ 41,086.00
Total extras	<u>\$ 10,730.00</u>
	\$ 59,816.00
Interest at 16% — Oct. 31/89 to Dec. 30/90.	\$ 11,420.00

¶ 11 The defendants responded by letter to the plaintiff of February 2, 1991, denying the claim and alleging, amongst other things, overpayment of \$13,540.55.

Position of the Parties:

¶ 12 At the end of the trial on August 22, 1996, I requested written arguments from counsel for the parties: it was agreed the plaintiff's submission would be prepared within 45 days; the defendants within a further 15 days; and a reply submission from the plaintiff within 10 days thereafter. The plaintiff's submission (32 pages with transcripts and authorities) was dated October 16, 1996; the defendants' submission (67 pages) was dated October 25th and the final plaintiff's reply (6 pages) was dated November 18, 1996. The court had the advantage of the copious exhibits from the trial (including the building plans referred to), extracts of partial

transcripts of various witnesses at trial and the defendants' Legal Brief filed at the end of the trial for consideration. I intend to summarize the positions of the parties in order.

Plaintiff's Argument:

¶ 13 The plaintiff argued that the defendants did not want the basement finished and, as a result, the cost of the house was to be increased by \$3,000.00 to \$115,000. The plaintiff testified that the defendant, Mr. Riddoch, agreed to this arrangement and that they shook hands confirming the deal.

¶ 14 The plaintiff alleges that when the house and garage were 99% completed (mid-September) the defendants requested the basement to be finished at an additional cost of \$24,000.

¶ 15 The plaintiff alleges that various changes were requested by the defendants to the original plan as the house construction progressed and they agreed to these extra costs.

¶ 16 An expert witness (engineer) testified on behalf of the plaintiff that the value of the work done and materials supplied by the plaintiff during construction of the house for the defendants totalled \$164,962.84. The plaintiff allowed a reduction of \$500.00, reducing the claim to \$63,249.27 (\$164,462.84 less \$101,213.57).

¶ 17 The plaintiff alleged that the defendants failed to make payments during construction of the house and that he was pressured to sign the contract of June 16, 1989, prepared by the defendants.

¶ 18 The plaintiff urged that the contract of July 16, 1989, between the parties is ambiguous and, as a result, it should be disregarded by the court.

¶ 19 The plaintiff alleged that the record-keeping for the house construction was to be the responsibility of the defendants and, accordingly, he was not required to keep records.

Defendants' Argument:

¶ 20 The defendants argued that the plaintiff's position at trial (respecting the June 16, 1989, written contract) was completely opposite to his position as framed in the pleadings (paragraphs 4 and 5 of the Statement of Claim, paragraph 1 of the Reply to Demand for Particulars). They submitted that the plaintiff is bound by his pleadings, unless amended with consent of the court and because this was not requested (let alone approved by the court) that the plaintiff has failed to prove his case as pleaded.

¶ 21 The defendants urged that the price representation by the plaintiff in his initial "proposal" of \$140,000.00 was binding on the plaintiff.

¶ 22 The defendants argued that the price of the work was firm and that the scope of the work to be performed was evidenced in the architect's plans, the main floor plan, the second basement plan, the Site Plan and the June 16th Agreement.

¶ 23 The defendants argued that the plaintiff saw the second basement diagram in February of 1989 (finished); that the Building Permit fee charged by the Regional Municipality was based on a "finished basement" and that the independent plumber testified that he did plumbing according to the "second basement" design and observed interior partition walls erected in the basement in June and July of 1989.

¶ 24 The defendants urged that brick was intended from the outset for the house and that the plaintiff was aware of this because it was shown on the plans submitted to the Regional Municipality for a Building Permit with the plaintiff in attendance and that the defendant, Mr. Riddoch, recalled that "Waterloo range brick" had been printed by the plaintiff on the top of his February proposal given to the defendants.

¶ 25 The defendants argued that the additional expense which resulted from rock being located on the property was included in the running account paid by them after the additional work was done in June of 1989 and that, in any event, absent further invoices or claims, these matters cannot be opened afresh.

¶ 26 The defendants urged that the independent evidence of the Bank of Montreal employee confirmed that the bank could have taken other security for a loan and while the construction contract was requested, it was not the only method of financing available to the defendants.

¶ 27 The defendants urged (based on the June 16th contract) that they overpaid the plaintiff \$13,540.55 for the house construction calculated as follows:

Contract after plumbing allowance	
(\$132,192.00 – \$14,075.00) \$	118,118.00
Less items paid by Riddoch’s	
(supposed to be paid by Leore) \$	37,339.36
Net owed to Leore \$	80,778.64
but paid to Leore \$	87,419.19
Overpayment to Leore \$	6,640.55
Items on contract finished by Riddoch’s	
(counterclaim) \$	6,900.00
Total overpayment by Riddoch’s	
on account of contract \$	13,540.55

¶ 28 The defendants argued that because there was a fixed price for the work to be done, this is not a case for the application of the doctrine of quantum meruit. The defendants argued that the evidence established that the extras claimed by the plaintiff were not discussed by the parties, that there were no records of such extras, that no invoice or claim was presented for these and, accordingly, this claim ought to be rejected.

¶ 29 Similarly, the defendants urged that the doctrine of contra proferentum is not applicable to the June 18th contract between the parties: the document they urge was composed by all parties (and merely typed by Mrs. Riddoch) who were relatively equal in contracting sophistication. The defendants urged that the plaintiff and his witness, Mr. Slivinski, were not credible witnesses, whereas the evidence of Mr. Riddoch and his witnesses was credible. (I will comment on this issue in my findings.)

¶ 30 Similarly, the defendants urged that the expert evidence of witnesses called by them (appraiser and quantity surveyor) was preferable to the expert testimony given by the engineer called by the plaintiff on the issue of the value of the work and material provided in the construction of the house. (I will comment on this issue as well in my findings.)

¶ 31 The defendants sought to increase their counterclaim from \$6,263.13 (the cost of work to complete) to \$12,903.68 to include the additional sum of \$6,640.55 for overpayment in accordance with the contract between the parties of June 18, 1989.

FINDINGS:

¶ 32 I am satisfied on a balance of probabilities that the contract dated June 16, 1989, and signed by the parties was a valid agreement between the parties detailing their assent to the basic scope of the work to be performed by the plaintiff and the price for this work.

¶ 33 The work that had been completed to that date was obviously intended to be included in the price. I am satisfied as well that the evidence preponderates that the work included a finished basement (as argued by the defendants) and that the parties intended from the outset that the house would be finished with a brick exterior. It is not open for the plaintiff to argue that the June 16th contract was of no legal significance amounting only to a proposed contract: the reliance in the Statement of Claim and the Reply to Particulars is, in effect, an admission by the plaintiff which can only be amended on application to the court which was not done.

¶ 34 I agree under these circumstances the plaintiff cannot rely upon the doctrine of quantum meruit, the price having been set in a contract signed by the parties, nor is it any answer to argue that quantum meruit was also included in the Statement of Claim; its inclusion therein in any view was inappropriate in the context of the prior pleadings which sought to affirm the legality of the June 16th contract binding the parties.

¶ 35 There is additional evidence which tends to confirm the reasonableness of the agreed cost of construction of \$132,193.00 in the June 16th contract, including the plaintiff's first estimate and undertaking that the construction of the house would not exceed \$140,000. I agree that this initial representation in any event was binding upon the plaintiff as an upper limit. The evidence of the expert witnesses supports the defendants' position on the agreed upon price of \$132,193.00: the quantity surveyor at page 4 of his report sets the value of the completed house to the defendants at \$133,944. The appraiser's report of November 8, 1989, set the value of the finished home at \$125,744.00 and the engineer called by the plaintiff himself set the value of the work at \$136,000.00 in his first report (dated July 18, 1994).

¶ 36 I was unable to accept as reliable the conclusions of the engineer's second report dated February 7, 1995 (prepared at the request of the plaintiff) for the following reasons:

(a)	the author of the report had very limited experience in single family housing construction and, as a result, could not provide detailed and specific analysis of the construction (as compared to the report of the quantity surveyor called by the defendants).
(b)	the author of the report drew assumptions from information gathered from one party only to the dispute which formed the basis, for example, of his description of certain work as "extras" to the contract.
(c)	I concluded from the organization of the report and the posture of the author in his testimony at trial that he was, in effect, partisan in his views or biased in favour of the plaintiff.

¶ 37 The report and testimony of the quantity surveyor who was called to give evidence by the defendants was in sharp contrast to the patently biased evidence of the engineer called by the plaintiff. The quantity surveyor testified that he reviewed all the contract documents with the aid of a computer programme to do a quantity take-off of the work and material provided. He said that in his analysis he assumes everything is to be paid by the contractor and reimbursed by the owner. I was impressed with his objectivity and thorough review of the house construction. When asked if the plaintiff was underpaid in accordance with the June 16th contract, he answered that he was not.

¶ 38 Similarly, I was unable to accept as reliable the plaintiff's evidence where it contradicted the evidence of the defendant, Mr. Riddoch, on such issues as the alleged agreement on extras, the inclusion of a finished basement or the intention of the parties to be bound by the June 16th contract.

¶ 39 The plaintiff's evidence respecting the finished basement not only was contradicted by Mr. Riddoch, but the evidence of the plans, the testimony of the plumber, Mr. Lavigne, who said he saw interior construction in the basement in June and July are independent support for the defendants' position that the contract initially included the cost of a finished basement.

¶ 40 I was unable to attribute any reliable support for the plaintiff's position on the dispute respecting the finished basement in the evidence of the witness (employee) called by the plaintiff in reply: timing of this work, of course, was critical to resolution of this dispute — this witness vacillated in his answer from his initial reply of the month of November to his subsequent answer placing this work in early or mid-September.

¶ 41 The plaintiff's reliability suffered significantly while being cross-examined; for example, he reluctantly agreed (after a pressing series of questions) that the contents of his letter to the defendants alleging that his lawyer had instructed him not to sign a contract were false: he often was non-responsive to questions and was obviously disorganized in his grasp of the chronology of events or their significance respecting the construction of the house.

CONCLUSION:

¶ 42

(a)	As a result of my findings, I have concluded that the defendants have over-paid the plaintiff for the value of the material and labour agreed upon in their June 16, 1989, contract, with the result that the plaintiff's claim is dismissed.
(b)	If I am mistaken as to the legal status of the document signed by the parties on June 16, 1989, and my view with respect to the applicability of the doctrine of quantum meruit, then I

	conclude on the evidence that the value of the work done and material provided by the plaintiff in the construction of the house was the sum of \$133,944.00 contained in the report of the quantity surveyor called to testify by the defendants. The defendants have paid on account of the house construction \$131,658.55.
(c)	I have reduced the present counterclaim by \$2,390.00: the defendant, Mr. Riddoch, admitted that he agreed to pay the cost of the rear deck (\$2,000.00); the motel bill (\$390.00) has been disallowed as the June 16, 1989, contract did not set a fixed date for completion. After giving credits for the garage door of \$627.89 and \$400.00 for railway ties, the present counterclaim is set at \$3,872.93.

¶ 43 The defendants have asked to amend their counterclaim to include the sum of \$6,640.55, being the amount of the overpayment by the defendants to the plaintiff. This claim was not detailed in the defendants' pleadings and, accordingly, I am not prepared at this point of the proceedings to permit an amendment to include the overpayment.

¶ 44 I have, accordingly, allowed the defendants' counterclaim in the amount of \$3,872.93.

¶ 45 Defendants' counsel is directed to forward written submissions on costs to me within 30 days. Plaintiff's counsel is directed to forward a written response within 15 days thereafter, with the defendants' counsel being permitted a further ten days for any reply.

¶ 46 Order accordingly.

COSGROVE J.