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AMELIA JANE BROWNING, AND OTHERS, TRADING AS THE SHARPE CONSTRUCTION COMPANY (DEFENDANTS) } APPELLANTS; *Nov. 22, 23. *Dec. 29.

AND

MASSON, LIMITED (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Contract — "Consistent conditions" — Impossibility of performance— Release from liability.

The defendants having filed a tender with the City of Quebec for the reconstruction of Dufferin Terrace agreed with plaintiffs that, if their tender was accepted, they would enter into a written contract, "consistent with the conditions" of such contract as might be made with the city, for the purchase from the plaintiffs of all the structural steel work that would be needed. The city corporation accepted the tender, but only on the condition that the steel and iron work should be purchased by the defendants from another firm.

Held, reversing the judgment appealed from (Q.R. 24 K.B. 389), Davies and Idington JJ. dissenting, that, on a proper construction, the agreement contemplated a contract to be entered into on terms consistent with whatever contract might have to be made with the city; that the nature of the condition imposed by the city corporation made it impossible for the defendants to purchase the necessary steel and iron work from the plaintiffs, and that, without fault on the part of the defendants, the agreement never became operative and both parties were liberated from obligation thereunder.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), whereby the judgment of Dorion J., in the Superior Court, District of Quebec, in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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favour of the plaintiffs, was varied by reducing the amount of the judgment entered for them from $1,982 to $1,482, with costs against the defendants in the Superior Court and costs against the plaintiffs on the appeal to the Court of King's Bench.

In the circumstances stated in the head-note, the plaintiffs brought the action for breach of the agreement to enter into the contract therein mentioned and claimed damages as follows, viz., $182 for their expenses incurred in taking measurements and preparation of the plans in order to enable them to make a tender; $3,100 for profits expected from the execution of the works in question, and $2,330 for damages resulting from being deprived of the benefit of being contractors for the construction of works of an important public character in such a prominent situation and the loss of the advantages that they would thereby have obtained in the way of advertisement of their capability in matters of construction of that nature. The trial judge allowed the first item in full, also 10% profit on the estimated cost of the works contemplated to be done by the plaintiffs, amounting to $1,300, and $500 for loss of advertisement, thus making $1,982 for which judgment was entered in favour of the plaintiffs with costs. On the appeal to the Court of King's Bench, the trial court judgment was reduced by the disallowance of the item of $500 for loss of advertisement and affirmed as to the balance, $1,482, with costs as stated above.

From the latter judgment the defendants appealed to have the action dismissed with costs and the defendants, by cross-appeal, sought to have the judgment of the Superior Court restored.

L. A. Taschereau K.C. for the appellants and cross-respondents.

St. Laurent K.C. for the respondents and cross-appellants.

THE CHIEF JUSTICE.—The appellants are general contractors and, as such, made, in competition with others, a tender for the reconstruction of the Dufferin Terrace in the City of Quebec. After consideration, the Road Committee decided to recommend the appellants' tender for acceptance by the council as the most advantageous, but on the condition that they—the appellants—would purchase the steel and iron required for the execution of their contract from the Eastern Canada Steel Company, a local concern engaged in the manufacture and erection of steel and iron structures. The respondent company also carried on the same business at Quebec. The council, adopting the recommendation of the Road Committee, awarded the contract to the appellants.

A letter purporting to set forth an agreement theretofore made between the appellants and the respondents was written about the time the tender was being considered by the council; but this letter, although drafted by the respondents on August 21st, was not signed until the 24th August by the appellants. That letter is in these words:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.
Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for furnishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four

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hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

It will not be necessary to consider the legal effect of the vague and ambiguous language used in the first two paragraphs. This appeal turns upon the meaning attributable to the last paragraph and more particularly to the governing word "consistent." To properly appreciate the effect of the language used, it is important to consider the circumstances under which the letter was written. It is apparent upon the evidence that the paragraph now directly in question was added to the letter at the instance of the appellants and for their protection and, in view of the then existing situation, it was a very elementary precaution to take because, at the date the letter was signed, not only did both parties know that the appellants' tender

was accepted subject to the condition that the steel required should be purchased from the Eastern Canada Steel Co., but a contract containing that condition was actually prepared by the city notary and ready for appellants' signature. One should not lightly assume that in those circumstances the appellants would give an absolute undertaking to sublet the same work to the respondent company.

Let us now analyze the language used, because, of course,

> all contracts must be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement.

Evidently the appellants must not be presumed to have intended to bind themselves to do more than to give the contract to the respondents if they could do so consistently with the terms of their own contract with the city. It is not to be assumed that their intention was to obligate themselves without consideration to give a contract which it was impossible for them to carry out. The respondents, who drafted the letter and are, therefore, responsible for the choice of words, say:—

> *It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.*

Bearing in mind that the dictionary meaning of the word "consistent" is "compatible with," "not contradictory of," the sentence must be read to mean that the appellants obligate themselves to enter into a contract with the respondents only if such a contract would be compatible with and not contradictory of the conditions in their own contract with the city. And could anything be more incompatible with or more

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contradictory of that condition of the contract with the city by which they bound themselves to give the preference to the Eastern Canada Steel Company than an undertaking to give the respondent company the steel work for the terrace? And that it was not intended when the letter was written to enter into a binding agreement such as is now relied upon is made absolutely clear by the evidence of Masson, one of the chief officials of the respondent company. Speaking of the letter, he says:—

Q. Maintenant, subséquemment à l'ouverture des soumissions, avez-vous rencontré les représentants de la Sharpe Construction Company, lors de la signature du document produit comme exhibit P. 3?

R. Nous avons été les rencontrer a l'instance de Monsieur Laurent et nous avons discuté cette question-la justement et de la faire accepter par écrit.

Q. Alors pour quelle raison, pour quel motif votre premier prix a-t-il été réduit à treize mille piastres ($13,000)?

R. Par le fait, il y avait dans le temps des pourparlers justement, qui pouvaient nous causer des embarras, et nous avons dit "s'ils étaient consentant de nous signer ce papier-là, que nous consentirions à réduire la chose à ce prix-là, pour avoir le contract," pour lequel nous aurions le contract et qu'ils *nous promettent que en tant qu'il serait en leur pouvoir*, que le contract n'aille à aucune autre.

In those words, *"en tant qu'il serait en leur pouvoir,"* we have the key to the meaning which the word "consistent" had in the minds of both the parties.

The allegations of respondents' declaration also support that construction of the sentence. The claim for damages is largely, if not entirely, based not upon a breach of the written undertaking, but upon the allegation that, notwithstanding that undertaking, the appellants allowed the city to insert in their contract a condition which made it impossible for them—the appellants—to carry out their agreement with the respondents and on the evidence it is clear that the ap-

pellants were not privy in any way to the action of the City Council but, on the contrary, did all they could to get the consent of the city officials to give the work to the respondents.

The judgment in appeal proceeds on the assumption that the appellants distinctly connived at the insertion in their contract with the city of the condition giving the preference to the Eastern Canada Construction Company. Mr. Justice Pelletier, who gave the majority judgment below, says:—

Sharpe a signé ce contrat et accepté ces conditions qui lui faisaient manquer à son contrat avec l'intimé, *sans même en parler à ce dernier;* sa soumission pour les travaux à faire à la Terrasse *était de* $17,000 *plus basse* que les autres et le Conseil de Ville n'aurait pas imposé cette différence considérable aux contribuables si Sharpe *avait voulu résister un peu, il n'avait qu'à faire un semblant de résistance* et dans quelques jours l'affaire aurait été réglée par l'abandon de la condition imposée par la ville.

Upon the evidence I would reach a contrary conclusion. Laurent says:—

Q. Quant à vous personnellement, comme membre de la société de la Sharpe Construction Company, aviez-vous aucune objection quelconque à ce que le contrat de l'acier fut donné à la compagnie Masson ?

R. Non monsieur, au contraire, j'étais très désireux, j'aurais été très désireux de lui donner le contrat.

Q. Pourqoui ne leur avez-vous pas donné ?

R. Par rapport à cette clause qui nous obligeait de donner le contrat à la Eastern Construction Company, c'est ce qui m'a fait.

* * *

Q. A la Eastern Canada Steel Company ?

R. Oui, monsieur, c'est ce qui m'a fait comprendre le notaire, quand nous avons signé le contrat.

Q. Vous avez examiné la chose avec le notaire ?

R. Oui, monsieur.

Q. Et le notaire a fait remarquer que ?

R. J'aurais voulu exiger qu'il enlève cette condition-la afin de nous permettre de donner le contrat à ceux que nous aurions voulu; et le notaire a fait remarquer que ce n'était pas possible qu'il fallait signer le contrat tel qu'écrit et nous conformer aux exigences.

* * *

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Q. Pourqoui cette obligation-là se trouvait ?

R. Parce que c'était car un ordre du Conseil qui mettait une clause passée par la ville, c'est-à-dire par le comité des chemins.

Q. Approuvée par le conseil ?

R. Approuvée par le conseil.

To the same effect Sharpe and Drouin testify.

To repeat what I have already said, if the document relied upon is construed as it should be according to the primary and natural meaning of the language in which the contracting parties chose to express the terms of their mutual agreement, then the undertaking of the appellants was to give the steel work to the respondents if to do so would be compatible with the terms of their contract with the city. The language used, I submit respectfully, is not susceptible of being construed to mean that the appellants assumed to give respondents a contract which would in its terms conform to their contract with the city, as assumed by the trial judge, but to give them a contract, if they could do so consistently with the conditions of their contract with the city; and that is the only contract which in the circumstances business men could reasonably be expected to have made.

I have gone carefully through all the evidence and can find nothing to justify in any way the suggestion of wrong-doing on the part of any member of the City Council. They were all examined as witnesses and, judged by the ordinary standard of municipal ethics, there is no ground of complaint. In any event, our sole duty is to interpret the agreement which the parties made and we have no mandate or authority to sit in judgment on the conduct of the members of the Quebec City Council.

The appeal should be allowed with costs and the cross-appeal dismissed with costs.

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DAVIES J. (dissenting).—The appellants being the successful tenderers with the City of Quebec for certain work to be done to the new Dufferin Terrace in that city, at the tendered price of about $55,000, entered into a written agreement with the respondents binding themselves to sign a contract with the latter as soon as the contract with the City of Quebec was executed for the furnishing and erecting complete the structural steel work of the said terrace. It would appear from the agreement made between the parties hereto that the city had the right to adopt either one of the two alternative plans stated in the agreement under one of which the respondents were to furnish and erect complete the structural steel work of the terrace for $11,400, and under the other for $13,000.

Then follows this clause:—

> It is further understood and agreed that either of the contracts mentioned above will be consistent of the with the conditions of your contract with the City of Quebec.

As a matter of fact, the City of Quebec caused, with the respondents' assent, the insertion of a clause in the contract professing to bind the appellants to give the preference to the Eastern Canada Steel Company, Limited, for the furnishing of the steel structure, provided the price they charged was not greater than other companies were prepared to supply such structure.

The appellants sought, under cover of this extraordinary clause, to the insertion of which in the contract with the city they had assented, to escape their contractual obligations to the respondents under the agreement made with them.

It does not seem possible that such an attempt

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could be successful. Both courts below have held adversely to such contention and I concur with them.

The language of the clause is ambiguous, I admit, just such curiously ambiguous language as gives rise to so much litigation in commercial and business contracts. It provides that either of the contracts specified in the agreement in question between the parties

will be consistent with the conditions in appellants' contract with the city.

One of such contracts was adopted by the city and inserted in the tenderer's contract, but to it was added the clause giving rise to the litigation.

That clause does not mean, however, that the appellant was to assent to the insertion of a clause in the city contract, which would completely annul his contract with the respondent.

It allows a latitude for the adoption of either of the contracts provided for in the agreement between the parties and probably also for changes which the city might legitimately make in the size, character and strength of the works tendered for. Within that ambit, reasonable changes might possibly be required from the successful tenderer and to that extent the agreement between the parties might be moulded and its details changed. But I repeat that, whatever else it may mean, such a clause did not contemplate changes being made which completely destroyed the contract the parties had entered into between themselves and if given effect to would transfer to another rival company the work, labour and material which the respondents had agreed to supply at a stipulated price.

I think also that the damages allowed are reasonable and that the respondents cannot recover the

damages for which they have cross-appealed on the ground that they were not such as could be held to have been within the contemplation of the parties at the time they entered into their agreement.

I would dismiss the appeal with costs and cross-appeal with costs.

IDINGTON J. (dissenting).—The appellants tendered for work to be done by the municipal corporation of Quebec in response to an advertisement asking for tenders therefor according to certain specifications.

The tender put in by the appellants as found by the committee in charge of the business was the lowest and most advantageous, and reached a total of about fifty-five thousand dollars.

The next lowest exceeded this by about $17,000. The respondents had given appellants before the tender an estimate of $15,000 for the part in question herein. After the tenders had been opened the appellant succeeded in squeezing the respondent down from this price to the lower price of $13,000.

A written agreement securing this was entered into between the parties hereto as follows:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for furnishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures

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of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

The city council in passing a resolution on the 21st of August, 1914, granting the contract to the appellant, inserted, without any reason being assigned therefor, the following clause, which was carried into the contract:—

Dans l'achat de son acier, la compagnie dite "Sharpe Construction Company" devra donner la préférence à la "Eastern Canada Steel Company, Limited,' pourvu que les prix de cette compagnie ne soient pas plus élevés que ceux des autres compagnies pour la fourniture du dit acier.

Thereupon the appellants refused to carry out their contract with respondent making the foregoing the excuse for doing so. The courts below have held it was no excuse and the learned trial judge assessed the damages for breach of contract at $1,982 which was reduced by the court of appeal to $1,482 by the deduction of an item to which I will presently refer when I come to deal with the cross-appeal.

The contention of appellants is that the last sentence of the contract above quoted relative to the contract being inconsistent with the condition in appellants' contract with the city governs; and that the latter contract having inserted therein the clause copied from the resolution put an end to the contract sued upon.

It is quite clear that the contract with the city adopted in its entirety the second alternative, in the contemplation of the parties as set out in their contract, without the slightest variation.

It seems equally clear that it was only the possibility of some variation in that regard that the parties had in mind. Such, I take it, was the meaning which the business men who wrote it intended to give it. It certainly never was intended by the respondent that the instrument should not only give appellants the advantage of reaping the profit of $2,000 which appellants got thereby, but also furnish them with the means of thereby betraying the trust which the respondent had reposed in them. That, however, would be the net result of such an interpretation of the contract as appellants put forward.

The original tender given the appellants before their tender to the city by the Eastern Canada Steel Co., Ltd., was $4,000 in excess of this $13,000.

It certainly could not have been in the contemplation of either party hereto that such a reduction would be made, or that the city council would lend itself to the improper proceeding of favouring, without any other reason than mere favouritism, one city manufacturer over another in face of such a contract as set out above.

Such a proceeding was not, I venture to think, a

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thing that ever could have been anticipated by any one signing such a contract. If the appellants had disclosed such a purpose as possible they never would have got the respondent to sign and give them the $2,000 of advantage they have reaped by such signing.

The appellants were bound to see that the reasonable expectations of respondent under such a contract were realized.

It was not for them to execute a repudiation of it, for that is what it comes to if the clause has the effect they now pretend. However, the clause itself, I incline to hold null as being *ultra vires* and against public policy. The manifest tendency of such a mode of dealing on the part of municipal councils would be to produce that fraud and want of good faith pleaded herein and I submit rendered it objectionable on the latter ground.

And I think it would have puzzled any one trying to enforce it to have found it *intra vires* unless something else put forward than appears in the evidence herein or in the city charter. Counsel could not refer us to anything in the latter maintaining it. The pleading not having set up exactly this view, but the more extreme one of fraud, it is not now open to respondent, save in the way of illustrating the real nature of what the appellants assented to, and their unjustifiable excuse for doing so. That certainly cannot fall within the last sentence of the contract as touching what the parties must be presumed to have understood.

Appellants urge that, in any event, the sum of $180 for expenses of preparing plans, etc., ought not to have been allowed.

The rather ingenious argument of Mr. Taschereau

in regard to this claim that the item of $1,300 for loss of profits impliedly covered it, is, I think, unsound.

The $1,300 for loss of profits only compensates for loss of profits presumably got after the respondent had been recouped, for all his expenditure, including this item in the execution of the work.

I think the appeal should be dismissed with costs.

The respondent cross-appeals in respect of $500 allowed by the learned trial judge on account of the advertising advantages it might have acquired by doing the work in a creditable manner in such a public place as where the work was to have been executed.

Work well done and the good quality of goods supplied count for much, no doubt, in the way of business success, and are the very best advertisements any man can present to the world, but I hardly think the loss of opportunity in such regard has ever been held as an element properly entering into the assessment of damages for breach of a contract.

The only cases I can recall wherein such an element has been allowed to enter into the assessment of damages are actions for libel or slander or such like action which involve undesired or undesirable advertisement.

I think the cross-appeal should be dismissed with costs.

DUFF J.—The agreement upon which the action is brought is in the following terms:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for fur-

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nishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

In construing this document there are two general considerations which I think it is important to keep in mind.

First, it is an informal letter containing proposals not intended to be proposals which, on acceptance, shall constitute a contract for the sale of steel or for the erection of a steel structure, but proposals for entering into a presently binding agreement that, in a certain event, namely, the awarding of a certain contract by the council of the City of Quebec to the appellants, the parties shall sign contracts for the erection of the steel structure of the Dufferin Terrace by the

appellants and providing in a general way for the nature of the contracts so to be entered into.

Secondly, that in construing such a document all the parts of it must be read together and each construed by the light of all the others and that especially in case of such an informal document it is important to read the language of the document in the light of the existing circumstances so far as known to both parties and with reference to which they must be assumed to have been contracting.

Now, at the time the appellants signified their acceptance of the respondents' proposal and some hours before that, it was known to both parties that it was quite possible that the municipality would insist upon stipulating as one of the terms of their contract that the steel should be purchased from the Eastern Canada Steel Co. The parties no doubt hoped that they would succeed in inducing the council not to insist upon this condition, but the fact that they were threatened with it was known to them both; and it is in light of the fact that this contingency was present to their minds that the proposals contained in this letter must be read.

And what meaning are we then to attribute to the last paragraph ?

> It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

The "contracts mentioned above" are the contracts which the parties proposed to enter into after the contract with the municipality should be signed. The parties bind themselves to enter into contracts of the general description set forth in the first two paragraphs of the letter, but subject to the proviso that

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these contracts must be consistent with the "conditions" of the municipal contract, that is to say, must be capable of being being carried out consistently with due performance of the obligations created by the municipal contract. There can be no doubt in my view that the language taken in its primary sense limits the obligation of both parties to entering into contracts which shall be "consistent" with the contract with the municipality; an obligation, therefore, which only becomes operative in the event of the contract with the municipality being of such a character as to permit the parties making and carrying out the contracts proposed. That being the effect of the language of this letter, I confess that, with great respect to others who take a contrary view, I have no difficulty in reaching the conclusion that the proper construction of the document is this very construction which is suggested by an examination of the words themselves.

In truth the contention of the respondents seems to me, with great respect, really to involve a more or less palpable *petitio principii* (notwithstanding the disguises which skilful advocacy has designed for it). The argument really rests upon the assumption that the essence of the agreement was that the appellants undertook not to enter into a contract with the municipality which did not permit them to purchase the steel from the respondents. The intention to enter into such an undertaking is not declared in express terms by this document which provides that any contract to be entered into by the appellants with the respondents must be capable of execution consistently with the obligations of their contract with the municipality. No such undertaking can be implied from the

document read as a whole in the light of the circumstances because it is impossible to say from anything before us that such a stipulation was necessary to give effect to the objects of the parties as disclosed by the document; and still less can it be said that reasonable and honest business men if they had thought of the contingency which happened would certainly have stipulated expressly as it is contended they did stipulate impliedly, because the fact is that they had in mind that very contingency and this very document which was prepared by the respondents and proposed by them as expressing the terms of their contract contains no such stipulation.

It is needless to say that a very different question might have been presented for decision if the respondents had proved that the appellants had by their own conduct brought about the insertion in the municipal contract of the stipulation requiring the steel made use of to be purchased from the Eastern Canada Steel Co.

ANGLIN J.—With Mr. Justice Pelletier I have found some difficulty in giving to the concluding clause in the plaintiffs' letter of the 21st August, 1914, the construction for which the defendants contend. The word "consistent" is certainly not the most apt to express the idea which they maintain it was intended to embody. But, read in the light of the circumstances under which it was written, it would seem probable that by the clause in question the parties must have meant not merely to provide for alterations in the contract between the plaintiffs and the defendants so as to make it conform in minor details to the terms of any contract which the municipality should exact

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from the defendants, but also to provide against liability of the defendants to the plaintiffs if the municipal council should insist upon making their contract subject to any condition which would disable the defendants from entering into a sub-contract with the plaintiffs. The municipal council did insist on such a condition. There is nothing in the record which indicates anything in the nature of connivance or collusion on the part of the defendants. On the contrary, they appear to have acted with scrupulous good faith towards the plaintiffs.

I would, therefore, allow this appeal and dismiss the action with costs throughout, substantially for the reasons given by Mr. Justice Cross and concurred in by Mr. Justice Lavergne in the Court of King's Bench.

BRODEUR J.—Il s'agit d'une action on dommages pour inexécution de contrat.

Les appelants avaient soumissionné pour la reconstruction de la terrasse Dufferin, à Québec. La cité de Québec, qui faisait exécuter ces travaux était disposée à accepter la soumission des appelants, mais à la condition qu'en achetant leur acier ils donnent la préférence à la Eastern Canada Steel Company.

Les appelants, qui pour faire leur soumission avaient eu des prix de la compagnie intimée, mirent cette dernière au courant de cette condition; et, de concert avec elle, firent auprès des autorités municipales des démarches dans le but d'induire ces dernières à accepter leur soumission purement et simplement.

Au cours de ces démarches, l'intimée et les appelants ont fait une convention par laquelle les appe-

lants s'obligeaient de prendre leur acier de l'intimée si la cité de Québec leur confiait la reconstruction de la terrasse suivant l'un ou l'autre des plans suggérés, ajoutant en outre:—

It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

Les négotiations se poursuivirent avec la cité de Québec et cette dernière refusa d'enlever la stipulation favorable à la Eastern Canada Steel Company.

Les appelants suggérèrent ensuite à l'intimée de diminuer son prix afin qu'ils soient libérés de cette préférence qui devait être donnée à la Eastern Canada Steel; mais l'intimée refusa et alors ils furent obligés de donner le sous-contrat à cette autre compagnie.

Toute la question repose sur l'interprétation qui doit être donnée à cette convention intervenue entre l'intimée et les appelants.

L'intimée prétend que les appelants étaient tenus du moment qu'ils avaient le contrat avec la cité de Québec, de lui donner la fourniture de l'acier.

Les circonstances, il me semble, ne pourraient pas autoriser une semblable interprétation du contrat. Les parties, quand elles ont fait leur convention, connaissaient les exigences de la ville de Québec; et vouloir dire que les appelants se seraient engagés formellement de donner le contrat à l'intimé même si la cité de Québec persistait dans sa clause préférentielle paraîtrait absolument extraordinaire.

La convention a été préparée par l'intimée elle-même. Dans le cas de doute elle doit être interprétée contre celle qui a stipulé et en faveur de celui qui a contracté l'obligation (art. 1019 C.C.).

Si la stipulation que nous avons citée textuelle-

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ment ne s'y trouvait pas, il y aurait peut-être doute de savoir si les défendeurs se seraient obligés, au cas où ils auraient le contrat de la ville de Québec, de donner le sous-contrat à l'intimée. Mais cette stipulation est à l'effet que les obligations du sous-contrat seront compatibles (consistent) avec les conditions du contrat principal.

Le mot *"consistent,"* dans ces circonstances, peut prêter à différentes interpretations. Ce contrat n'a pas été préparé et examiné par des hommes de loi; mais il l'a été par des hommes d'affaires et il n'y a pas de doute, suivant moi, que l'intention des parties était que s'ils pouvaient réussir à faire disparaître cette condition insérée par la ville de Québec, ou s'ils pouvaient de toute autre manière faire disparaître cette stipulation, alors le sous-contrat irait à l'intimée.

Si nous examinons même le sens littéral de la lettre en question, sans examiner les circonstances particulières dans lesquelles elle a été écrite, je crois que l'intimée ne pourrait pas également réussir.

En effet, les demandeurs auraient dit: Nous sommes bien prêts à vous donner le sous-contrat pour l'acier, mais aux mêmes conditions que la cité de Québec nous imposera.

Or, l'une de ces conditions-la était de donner la préférence à une certaine compagnie pour l'achat de l'acier. Rien de plus facile alors pour l'intimée d'accepter cette condition-la. Il lui aurait fallu simplement donner la préférence dans son achat pour l'acier à la Compagnie Eastern Canada Steel. De sorte que si nous examinons soigneusement les circonstances de la cause, si nous prenons en considération l'intention des parties, et si nous prenons même la lettre du contrat la demanderesse intimée n'est pas en droit de

poursuivre les défendeurs-appelants pour inexécution d'obligation.

Dans ces circonstances, je considère que le jugement *a quo* doit être renversé avec dépens de cette cour et des cours inférieures et que l' action de la demanderesse-intimée doit être renvoyée avec dépens.

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Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Galipeault, St. Laurent, Métayer & Laferté.*