2001

Gibbons and Reed Company v. City of Ogden, Utah, Utah State Road Commission, Oscar A. Robin, Hardy Scales Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS AND REED COMPANY, a Utah corporation, Plaintiff and Appellant, vs. CITY OF OGDEN, UTAH, a municipal corporation; UTAH STATE ROAD COMMISSION; OSCAR A. ROBIN; and HARDY SCALES CO., a corporation, Defendants and Respondents.	CASE NO. 14030

APPELLANT'S BRIEF

Appeal From a Judgment of the District Court
of Weber County
Honorable Ronald O. Hyde, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Appellant,

vs.

CITY OF OGDEN, UTAH, a municipal corporation; UTAH STATE ROAD COMMISSION; OSCAR A. ROBIN; and HARDY SCALES CO., a corporation,

Defendants and Respondents.

CASE NO. 14030

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action by highway contractor against a landowner and its successors in interest for breach of an agreement to supply road building materials; against the Utah State Road Commission for breach of a highway construction contract; and against the landowner's successors for interference.

DISPOSITION IN LOWER COURT

The trial court entered judgment in favor of all defendants and respondents, no cause of action.

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant seeks reversal of the judgment and remand to the district court with directions to enter

Judgment for appellant in the amount of $41,596.00; or to make additional findings of fact; or for a new trial.

STATEMENT OF FACTS

In connection with its highway construction program, it is the custom of the Utah State Road Commission to obtain options to purchase road building materials, and to permit its highway contractors to exercise the options in order to obtain necessary materials. When bids are solicited, the options are included in the proposed contract.

In early 1965, the Road Commission was planning a section of Interstate 15 between 31st Street and 300 North in Ogden. Two representatives of the commission, Richard N. Griffin and Otto Schrader, Jr., approached C. Ray Kimball, Assistant Ogden City Engineer, about the possibility of purchasing road building materials from the city. They were referred by Mr. Kimball to Charles R. Kelly, Director of Public Works (R.555).

Mr. Kelly said he believed that some materials could be removed, and the price of $.03 per cubic yard was discussed, but Mr. Kelly asked the road commission representatives to send him a letter requesting the option (R.556).

On May 20, 1965, Mr. Schrader wrote a letter to Mr. Kelly (Ex.F), stating that the Road Commission's needed approximately 1,900,000 cubic yards of material, and that it

would be to the parties' mutual benefit if some of the materials could be removed from property owned by the city. Mr. Kelly replied that the city was willing to enter into an option agreement, and that the request to purchase the material had been approved by the city council (Ex.E).

Subsequently an "Option For Purchase Of Road Building Material" dated September 30, 1965, was signed by the City Manager:

> This agreement entered into this 30 day of September, 1965, by and between the State Road Commission of Utah, hereinafter called the "Road Commission", first party, and City of Ogden, Utah (Sam B. Hood, City Manager) of Municipal Building, Ogden, Utah, hereinafter called "Owner", second party.
>
> WITNESSETH: That for and in consideration of the sum of One Dollar ($1.00) receipt of which is hereby acknowledged, the Owner agrees to sell to the Road Commission, road building material from the property of the owner situated in SE¼ of SW¼ and the NE¼ of the SW¼ of Section 31, Township 6 North, Range 1 West, SLB&M in Weber County, State of Utah.
>
> 1. If and when this option is exercised the Road Commission agrees to pay, or cause to be paid, for said road building materials at the rate of $0.03 (Three Cents) per cubic yard.
>
> 2. The Owner grants to the Road Commission the right of ingress and egress over and across the Owner's property for a haul road to and from the material site hereinabove described.
>
> 3. The rights and privileges hereby granted or reserved to the Road Commission may, at the option of the Road Commission, be exercised by any agent or contractor of the Road Commission.

4. Special Stipulations. This option is for the purpose of establishing the price at which satisfactory granular or other materials will be available to the Road Commission for use as borrow or other road building purposes. It shall also cover special conditions affecting their availability and removal. It shall not be construed to mean that the Road Commission shall have a sole or prior right to all materials on the above-described property for the entire duration of the option. The Owner or its authorized representative will be contacted and essential arrangements made for each, or any, occupancy and removal of materials. All stipulations regarding work areas, conditions in which property shall be left and any other pertinent agreements shall be made before entry is made upon the property for the purpose of removing any road building material.

The removal of any material coming within the scope of this option must positively be removed to the Owner's lines and grades.

5. This option shall be binding on the parties hereto, their successors, heirs and assigns.

6. This option expires December 31, 1966. (R.353-354).

There are some variations in the testimony regarding the negotiations. Mr. Griffin testified that Mr. Kelly pointed out that there was an option to Marquardt until about April 1, 1966, and that he would like the materials removed to an average depth of 6 feet (R.556). Mr. Griffin told Mr. Kelly about the plan of the Road Commission to include the option in its construction contract (R.559), and to make material available to its contractor under an established price for the material (R.560). The provision with respect to removal to the "Owner's lines and grades" was

language customarily used in such contracts (R.561).

Mr. Griffin stated that the discussion of the 6-foot depth was in connection with the option to Marquardt, and that this quantity could be removed even if Marquardt exercised his option. Mr. Kelly indicated to Mr. Griffin that if the option were not exercised, it would be possible to go to a greater depth, but Mr. Griffin did not compute the amount of the material (R.738).

Mr. Kelly did not remember discussing the 6-foot depth (R.596), but testified that he would have been willing to let Gibbons and Reed remove materials to a depth of 6 to 8 feet (R.596, 780). Mr. Kelly said that the language with respect to the Owner's lines and grades was put in specifically at his request (R.757, 758), but other evidence showed that this language was customarily included in previous options taken by the Road Commission (Exhibits P and Q).

On January 9, 1966, the state road commission sent out a "Notice To Contractors" (Exhibit G) requesting proposals for construction of the section of Interstate 15. The contract to which the proposals related included the option between the Road Commission and Ogden City.

Prior to the bid opening, Patrick Michael Gibbons, project engineer for Gibbons and Reed Company, went to the office of the Ogden City Engineer to find out how much

material Gibbons and Reed would be able to obtain from its property, so it would know what prices to put in its bid (R.610). At that time Mr. Kimball brought out a map of the property (R.611) and discussed with Mr. Gibbons the grades to which the material could be taken, i.e., to the ramp road elevation from 31st Street to the freeway on the east and the elevation of 31st Street on the west (R.613).

Mr. Kimball worked directly under Mr. Kelly, and Mr. Kelly would ordinarily expect Mr. Kimball to call to his attention conversations of the type had with Michael Gibbons, and he generally did (R.772). Mr. Kelly remembers that Mr. Kimball reported to him that Mike Gibbons had been there and had talked to him, but Kelly didn't remember what Mr. Kimball had said, except that Mr. Gibbons had been there to talk about getting material from the pit (R.773). Prior to Mr. Kimball's conversation with Mr. Gibbons, Mr. Kimball had discussed with Mr. Kelly the removal of the material from the city pit. The discussion related to the finished grade of 31st Street and I-15 on the east, though Mr. Kimball doesn't remember discussing the quantity with Mr. Gibbons when he came to see him (R.787). He did know that Gibbons and Reed was in the process of preparing a bid and that it probably wanted to know where it might get the material (R.788).

Gibbons and Reed representatives then went to the

property, and on the basis of the lines and grades specified by Mr. Kimball, determined that 628,000 cubic yards would be available from the property (R.628). A later survey by Donald Hargis, led to a determination that 1,048,713.5 cubic yards was available (R.699).

The Gibbons and Reed computations were consistent with the plans in the construction contract with the Road Commission, which contemplated the removal of 1,937,655 cubic yards from "Prospect No. 1," which included the city and railroad property (R.628). Of this sum, 1,274,000 cubic yards was to come from the railroad property (R.629), leaving 663,655 cubic yards to come from the city property.

Gibbons and Reed Company computed its highway bid on the assumption that substantially all of the fill material would be obtainable from Prospect No. 1.

Gibbons and Reed was low bidder and on February 18, 1966, entered into a construction contract with the Road Commission (Ex.G).

The standard specifications incorporated in the construction contract (Ex.M) contained the following provisions with respect to options for the purchase of road building material:

> The commission may acquire or secure options and make available to the contractor the right to take materials from these sources designated on the plans and described under special provisions, together with the right to use such

property as may be specified, adjacent thereto, for plant site, stock piles and hauling roads.

If the contractor desires to obtain material from sources under option to the commission, he shall comply with and fulfill all terms and conditions as may be stipulated in the option by the director; and shall notify the owner of the property of his intent to exercise the option before entering on the property. * * * (Emphasis added.)

Thereafter Ogden City entered into negotiations to sell the property. Upon learning of the sale, Gibbons and Reed Company met with representatives of Ogden City, including four members of the city council, and members from the Road Commission on May 17, 1966 (R.632), at which time the City Manager said that the city had made a deal and the property would not be available to Gibbons and Reed Company. Some possible alternatives were investigated by Ogden City but no other sources of materials were obtained (R.633, 635). Subsequently, on May 20, 1966, the city deeded the property to "Oscar A. Robin, a single man, president, Hardy Scale Company" and on May 30, 1966, entered into an agreement with him which contained the following provision:

> Buyer agrees that Seller has the right to remove dirt from the above-described land as provided in Paragraph 7 of the prior contract between the parties. Buyer acknowledges that the Seller has an agreement with the Utah State Road Commission concerning the removal of fill from this land by that Commission. In the event the buyer, within one year after the date hereof, decides to sell fill from his land, he shall give the State of Utah first right to purchase the same at the same terms and conditions as in the Seller's contract with the State Road Commission (R.371). (Emphasis added).

Mr. Robin knew of the option agreement with the Road Commission when he signed the contract with the city (R.725). The local representative of Hardy Scales Company, and the only person in the State of Utah dealing for Mr. Robin prior to his appearance in Utah on May 19 and 20 to sign the contract, was Clay Barnard II. Mr. Barnard, and an architect who was considering plans for building on the property, both refused to let Gibbons and Reed Company remove any fill from it (R.631, 657).

As a result, Gibbons and Reed Company was forced to obtain fill material from other sources and incurred increased costs in loading, hauling, placing, royalty fees, and the stripping and rehabilitation of the property. The total additional cost incurred by Gibbons and Reed Company because of its failure to obtain fill material from the city property, after giving the city credit for some costs it otherwise would have incurred, was $41,596.00 (R.670-671, Exhibit L).

The trial court found that the option agreement had been entered into; that it was furnished to Gibbons and Reed Company by the Road Commission for consideration in making its bid; that prior to making its bid the company discussed the option with the Assistant City Engineer, and that thereafter the company and the Road Commission entered into a

contract (R.510-511). It also found that the agreement for sale of the property was between Ogden City and Oscar A. Robin, rather than Hardy Scales Company; that Gibbons and Reed Company had not communicated to Robin any intention to exercise the option; that Gibbons and Reed Company was not reasonably justified in assuming that it could obtain 498,623 cubic yards of material from the property; and that the Road Commission had never represented the plaintiff that the option was a binding option agreement or for any fixed or established amount of road building material (R.512). The court concluded that the option agreement was "illusory, void, and ineffective," because it failed to set forth the amount of building material which might be obtained from the property; that the plaintiff had failed exercise the option; and that plaintiff had no cause of action against any of the defendants. Judgment was entered in favor of all defendants.

ARGUMENT

I

THE OPTION AGREEMENT WAS VALID, AND WAS ENFORCEABLE BY GIBBONS AND REED COMPANY.

In concluding that the option was "illusory, void, and ineffective," and that the agreement was to establish a price at which building material would be sold, if Ogden City decided to sell it, the trial court ignored the realiti of the situation and the context in which the parties were

bargaining. It was well known to Ogden City that the Road Commission needed approximately 2,000,000 cubic yards of fill material, and that the benefit of the option would be assigned to the highway contractor who was a successful bidder on the I-15 section. It was known (and it is common knowledge) that highway contractors in preparing their bids must know not only the price of material they are going to use in the contract, but the quantities they can obtain at a given price. The court chose to construe the option agreement as if it meant nothing.

If possible, a court should construe an agreement to give it some effect. The general rule is well stated in 17 Am.Jur.2d, Contracts, §254:

> * * * The terms of a contract must, if possible, be construed to mean something, rather than nothing at all, and where it is possible to do so by a construction in accordance with the fair intendment of a contract, the tendency of the courts is to give it life, virility, and effect, rather than to nullify or destroy it.

In Schofield v. ZCMI, 85 Utah 281, 39 P.2d 342 (1934), an employee of ZCMI had sought to enforce rights under a pension program. ZCMI argued that the pension plan was an offer of a gratuity and was not meant to constitute a binding contract between the parties. In rejecting this argument, this court said:

> It is elemental, in construing a contract, that its purpose, its nature, and subject mat-

ter should be considered. A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract. [Citations omitted].

These statements are in accord with the general rule as found in Restatement of Contracts, §236.

The purpose of the parties in this case was to assure a source of material for the construction of a highway. It was known by all that a substantial amount of material was required and that the contractor, in making his bid, would base his base prices upon the quantities of material available at particular prices and from particular sources. The contract is phrased in terms of legal liabilities:

> The Owner agrees to sell to the Road Commission, road building material * * *.
>
> If and when this option is exercised the Road Commission agrees to pay, or cause to be paid, for said road building materials at the rate of $0.03 (THREE CENTS) per cubic yard.
>
> The rights and privileges hereby granted or reserved to the Road Commission may * * * be exercised by any agent or contractor of the Road Commission.
>
> This option is for the purpose of establishing the price at which satisfactory granular or other materials will be available to the Road Commission for use as borrow or other road building purposes. (Emphasis added.)

Inasmuch as the parties intended to create legally enforceable rights, the only remaining substantial question of contract construction is whether the contract was too uncertain to be enforceable, because of the fact that it did not specify the quantity of material to be made available.

The option agreement provided that the material would be removed to the Owner's "lines and grades," but all of the witnesses agreed that such a provision would not permit the Owner to specify such lines and grades that no material could be removed. All knew that the highway contractor was entitled to remove some material. But how much?

The option agreement is analogous, in many respects to a "satisfaction" contract, i.e., one in which performance is conditional upon satisfaction of the promisor, and a rule like that applied in satisfaction contracts should be applied in this case.

The rule is set out in Restatement of Contracts, §265, as follows:

> A promise in terms conditional on the promisor's satisfaction with an agreed exchange, gives rise to no duty of immediate performance until such satisfaction; but where it is doubtful whether words mean that a promise is conditional on the promisor's personal satisfaction with an agreed exchange, or on the sufficiency of that exchange to satisfy a reasonable man in the promisor's position, the latter interpretation is adopted.

In Haymore v. Levinson, 8 Utah 2d 66, 328 P.2d 307 (1953), involving a house that was to be paid for upon "satisfactory completion," this court rejected the notion that the promisor was not required to pay unless "satisfied." The court distinguised "personal" satisfaction contracts from others, and said:

> The other class of cases involve satisfaction as to such things as operative fitness, mechanical utility or structural completion in which the personal sensibilities just mentioned would not reasonably be deemed of such predominant importance to the performance. As to such contracts the better considered view, and the one we adhere to, is that an objective standard should be applied; that is, the party favored by such a provision has no arbitrary privilege of declining to acknowledge satisfaction and that he cannot withhold approval unless there is apparent some reasonable justification for doing so.

Applying the objective standard, the court held that if, in light of such a standard, construction would meet the approval of reasonable and prudent persons, that should be sufficient. And in 13th and Washington Streets Corp. v. Neslen, 123 Utah 70, 254 P.2d 847 (1953), the court applied an objective standard notwithstanding a contract provision that the landlord would be "the sole judge" of the amount of heat, light, janitor and elevator services to be furnished for a building.

See also Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625 (1958), which holds that "satisfaction" contracts are not

illusory, and are enforceable.

An objective standard should be applied in this case, and the contract should be construed as requiring Ogden City to permit removal of such quantity of road materials as is reasonable under the circumstances, considering the needs of the contractor, the topography of the area, the condition of the property, the quantities of materials available, and the potential and prospective uses of the property after removal of the material.

But even if the contract, at the time of its execution, was not sufficiently certain to be enforced, it thereafter became so, and as said in Restatement of Contracts, §32, comment c:

> Offers which are originally too indefinite may later acquire precision and become valid offers, by the subsequent words or acts of the offeror or his assent to words or acts of the offeree.

See also, Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc., 29 F.2d 3, 4 (1928), in which it is pointed out by Justice Learned Hand, that the contract is enforceable if, "when the time arrives," there is some standard by which it can be tested.

The evidence is undisputed that prior to the time Gibbons and Reed Company submitted the highway bid, its project engineer went to the office of the City Engineer to determine the available quantity of material. Mr. Gibbons

testified that the Assistant City Engineer produced maps of the area and pointed out the lines and grades at 31st Street and the ramp road to Interstate 15. On this basis, Gibbons and Reed Company went to the property and made surveys of the quantity of material which could be produced. The first survey showed that approximately 628,000 tons could be obtained, and a second, more professional, survey showed that with a 2% grade more than 1,000,000 cubic yards could be obtained.

Without regard to the authority of the Assistant City Engineer to agree as to the amount of the material to be removed, it is clear that the city is charged with knowledge of the quantity expected to be removed by Gibbons and Reed Company. It was the duty of the Assistant City Engineer to report such matters to the Director of Public Works, and his to report to and consult with the City Council and the City Manager. Moreover, the Assistant City Engineer did in fact report to the Director of Public Works that he had met with Mr. Gibbons concerning the removal of the material.

Under these circumstances, the knowledge of the Assistant City Engineer was the knowledge of the city. The general rule, as found in Restatement of Agency, Second, §272, is as follows:

> In accordance with and subject to the rules stated in this topic, the liability

> of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.
>
> Comment c. Situations in which knowledge is important. In contracts, knowledge of a contracting party is relevant in determining the interpretation of the contract, in the determination of grounds for reformation or rescission, and in determing the questions relating to performance and breach. Thus, if one party knows that the other party is giving a particular interpretation to the words of an offer, this interpretation, unless prevented by the parole evidence rule, prevails. * * *

Inasmuch as Ogden City knew of the interpretation being placed upon the contract by Gibbons and Reed Company, any uncertainty was eliminated, and the city had an obligation to furnish the material needed by Gibbons and Reed Company, up to 628,000 cubic yards.

Ogden City was obligated to furnish the material whether or not there was any "consideration", e.g., a promise to take a particular amount of material. The doctrine of promissory estoppel applies, inasmuch as Ogden City knew of Gibbons and Reed's plans before the company submitted its bid to the Road Commission, and Gibbons and Reed relied, to its detriment, on the enforceability of the option. See Restatement of Contracts, §90:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbear-

ance is binding if injustice can be avoided only by enforcement of the promise.

II

OGDEN CITY IS ESTOPPED FROM CLAIMING THAT THE OPTION AGREEMENT WAS TOO VAGUE.

The authorities set out above relating to knowledge of the city, reliance by Gibbons and Reed Company, and action by Gibbons and Reed Company to its detriment, are also sufficient to estop Ogden from claiming that the option agreement was too vague to be enforceable. Because of its reliance on the designated lines and grades, Gibbons and Reed Company was damaged in the amount of $41,596.00, and the city should not now be heard to say that the contract was too vague. See Migliaccio v. Davis, 120 Utah 1, 232 P.2d 195 (1951).

The statute of frauds being an affirmative defense, Rule 8(e), Utah Rules of Civil Procedure, appellant will reserve argument on that point for its reply brief, if the point is raised by respondents.

III

OGDEN CITY BREACHED THE OPTION AGREEMENT.

The trial court found that even if the option agreement was valid, there was no breach because Gibbons and Reed had not exercised the option, and therefore "said option never became an effective contract for the sale and purchase of

any road building material" (R.513).

But under the circumstances, the company was not required to exercise the option. In early May, 1966, the company received information to the effect that Ogden City had sold the land to Hardy Scales Company; as a result, Richard F. Reed met with the Ogden council, the City Manager, and members of the Road Commission. The outcome of that meeting was that the city stood firm in its resolve to sell the property; and 3 days later, on May 20, it executed a warranty deed conveying to defendants Robin or Hardy Scales Co.. This was a repudiation of the option agreement and excused Gibbons and Reed from the formality of exercising it.

A positive statement that the promisor will not or cannot substantially perform his promise, or the transferring or contracting to transfer to a third person an interest in specific land, goods, or in other things essential for the substantial performance of a contractual duty, constitutes a repudiation of the contract. Restatement of Contracts, §318.

And where an optionor repudiates the option prior to the time of its exercise, it is held that an action for damages will lie without a subsequent attempt to exercise the option.

In Fullington v. M. Penn Phillips Co., 738 Ore. 321, 395 P.2d 124 (1964), the trial court had granted summary judgment in favor of an optionor on the ground, in part, that "an original action for damages in such a case when the option has not been exercised cannot be brought," suggesting that the option had to be "exercised" notwithstanding repudiation, and that damages could be recovered only if the optionor thereafter refused to perform the contract. The Supreme Court of Oregon reversed and held that accepted principles of contract law "compel us to recognize the right of the option holder to recover damages upon breach of the option contract."

In McFerran v. Heroux, 44 Wash.2d 631, 269 P.2d 815 (1954), an action was brought for a breach of an option agreement, where it had been repudiated, but not exercised. The court said:

> It has been suggested that this action was brought prematurely because, until the optionee exercises his option, he has no present right in the grandstand which is the subject matter of the option. It is true that the plaintiff does not presently have a contract of purchase. But to infer that, until an option has been exercised, the optionee has no rights of any kind capable of being enforced, is to ignore the contractual nature of the option itself.

See also authorities cited therein, 1 Corbin on Contracts, §272, p. 909, James on Option Contracts, §1104, p. 504; also

Thompson v. Whitney, 20 Utah 1, 57 Pac. 429 (1899), to the effect that demand and refusal are not necessary where a promisor has repudiated the contract.

IV

IF THE OPTION AGREEMENT WAS NOT ENFORCEABLE, THE UTAH STATE ROAD COMMISSION BREACHED ITS CONSTRUCTION CONTRACT WITH GIBBONS AND REED COMPANY.

There was testimony from Ogden's Director of Public Works that it was his oral understanding with the representatives of the Road Commission, at the time the option agreement was negotiated and signed, that Ogden City was not obligated to furnish any material, but that the agreement was for the purpose of fixing the price in the event Ogden City did elect to furnish material. There was also testimony from Mr. Schrader and Mr. Griffin to the effect that during the negotiations the city stated that the material could be removed to an average depth of only six feet.

If it is determined that an oral agreement between the commission and the city had the effect of limiting the liability of the city to a degree not indicated by the option agreement, the commission is liable to Gibbons and Reed Company for its contractual representations respecting quantities of material available, and for its failure to disclose the specific limitations required by the city with respect to the excavation.

In construction contracts an owner has a duty to disclose to contractors such pertinent information as is available to it.

In Kiely Construction Co. v. State, 154 Mont. 363, 463 P.2d 888 (1970), a contractor based his claim for recovery upon the fact that a report by the state indicated that 30-foot deep test holes had been drilled in a quarry, when they had not, and that the material encountered was different than that indicated in the contract.

The court noted that it was the practice of Montana State Highway Department to provide bidders with reports on the availability of surfacing material for the purpose of assisting the contractor in preparing his bid and obtaining a lower bid. The court held that the contractor was entitled to rely upon the information given to it by the state. The court reached a similar decision in Haggart Construction Co. v. State, 149 Mont. 422, 427 P.2d 686 (1967), holding the state responsible for the incorrect information given to the contractor, notwithstanding general exculpatory provisions. See also Helene Curtis Industries, Inc., v. U.S., 312 F.2d 774 (Ct.Cl. 1963); Hardeman-Monier-Hutcherson v. U.S., 458 F.2d 1364 (Ct.Cl. 1972); Foster Construction C.A. and Williams Brothers Company v. U.S., 435 F.2d 873, 880 (Ct.Cl. 1970); Morrison Knudsen Company, Inc. v. U.S., 397 F.2d 826 (Ct.Cl. 1968).

In the present case the commission had information not available to Gibbons and Reed: that the city intended to limit excavation to an average depth of 6 feet; and that it did not intend to be bound by an option agreement to furnish material, but was only willing to attempt to arrive at an agreement with a successful contractor. This information should have been disclosed in the contract documents, for it would have made a great deal of difference to the contractors in the computations of their bids. Mr. Griffin testified that the purpose of obtaining the option was to determine the availability of the material and to fix a price - a factor important to the commission since the prices at which materials are available would have a direct bearing upon the total price the commission was required to pay for the project.

Not only did the commission fail to disclose the negotiations between the city and the commission, it made positive representations in the plans. Sheet 3-A indicates that approximately 1,900,000 yards of material would be available from the railroad and city properties, of which more than 600,000 yards would have to come from the city property, inasmuch as the railroad property was capable of producing only 1,200,000 yards.

An additional factor bearing upon the liability of the commission in this regard is its practice to include in

option agreements any special limitations or burdens with respect to the obtaining of material. This is borne out by the testimony of the two commission representatives, and by the provisions contained in the other option agreements introduced in evidence, Exhibits P and Q.

V

DEFENDANTS ROBIN AND HARDY SCALES COMPANY TORTIOUSLY INTERFERED WITH THE OPTION AGREEMENT BETWEEN GIBBONS AND REED COMPANY AND OGDEN CITY.

Mr. Robins testified that he knew of the Gibbons and Reed option agreement when he entered into the agreement with the city. Notwithstanding this knowledge, and reason to know the specific terms of it, the parties contracted with the city for the purchase of the property. See 86 C.J.S., Torts, §§43 and 44; and 45 Am.Jur.2d, Interference, §§41 and 50.

In addition, Robins or Hardy took the property subject to an equitable servitude, since they had knowledge of the option. See 20 Am.Jur.2d, Covenants, Conditions, and Restrictions, §305. Although it is not clear who entered into the contract with the city and took the conveyance, Robin is the sole owner of all of the stock in Hardy Scales Company and the purchase was being made for the purposes of both. The only representative Robin or Hardy had in the state of Utah was Clay Barnard III, who told Gibbons and

Reed Company that they would not be able to remove any material from the property. This is sufficient to bind Mr. Robin and the company.

VI

GIBBONS AND REED COMPANY SUFFERED SUBSTANTIAL DAMAGES.

Because of the necessity of Gibbons and Reed Company obtaining fill material from another source, it incurred increased costs for hauling, placing, excavation, stripping, and rehabilitation of the property from which the material was taken. The amount of such damages were computed carefully from general production costs of Gibbons and Reed Company and expert projections. They totaled $41,596.00.

VII

THE COURT FAILED TO MAKE FINDINGS OF FACT ON ALL OF THE MATERIAL ISSUES IN THE CASE, AND THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE JUDGMENT.

There were a number of issues in this case which the court simply did not touch upon in making and entering its findings of fact. There was no finding as to knowledge of the city respecting the reliance of Gibbons and Reed Company on lines and grades established by the Assistant City Engineer; the amount of damages; or repudiation of the option by the city. The conclusions reached are contrary to the law, and if this court does not direct entry of judgment for plaintiff, the district court should be directed to make

findings on the material issues raised by the pleadings and the pre-trial order.

VIII

THE MEMORANDUM OF COSTS FILED BY THE UTAH STATE ROAD COMMISSION WAS NOT TIMELY.

In the court below Gibbons and Reed Company filed a motion to have the costs taxed by the court, but such motion was not ruled upon by the court prior to transmittal of the record to this court. Inasmuch as the costs to be awarded "shall abide the final determination of the cause," Rule 54(d)(1), Utah Rules of Civil Procedure, it is not necessary for the court to determine the costs at this time, but appellant is not abandoning its right to challenge the costs claimed by the respondents.

CONCLUSION

Ogden City, with full knowledge that the Road Commission was obtaining options for road building materials in orde to establish prices at which materials would be available, executed an option agreement by which it agreed to sell road building materials for three cents per cubic yard. Under this agreement, Ogden City had an obligation to permit Gibbons and Reed Company, the successful bidder, to remove such material as was reasonable under the circumstances.

If the option agreement was initially too vague to be enforceable, it became enforceable when Gibbons and Reed

Company went to Ogden City to determine the lines and grades to which material might be removed. The Assistant City Engineer, who had a duty to report to the Director of Public Works, and who in turn had a duty to report to his superiors, knew what Gibbons and Reed Company was planning and that knowledge is the knowledge of the city.

All of this occurred prior to the time Gibbons and Reed Company submitted its bid to the Road Commission in reliance upon the option agreement and the lines and grades established. If the contract was uncertain to begin with, it became certain then, and Ogden City became obligated to furnish the 498,000 cubic yards Gibbons and Reed Company had to find elsewhere.

It was not necessary to "exercise" the option inasmuch as it had been repudiated; and this action is for the damages resulting from breach of the option agreement.

Defendants Robin and Hardy Scales Company had obligations under the contract, and they also had an obligation not to interfere with Gibbons and Reed's contract with Ogden City, or even with its reasonable expectation of obtaining material. The covenant and agreement between those parties and Ogden City refers to the option and the purchasers had an obligation to know the terms of that agreement and the rights claimed under it.

If neither Ogden City nor Robin and Hardy Scales Company is liable under the agreement, the Utah State Road Commission is. It gave the contractor definitive information as to the amount of materials that might be expected, and failed to disclose to it other information it had as to the expectations of Ogden City and the possible limitations on the depth to which materials might be removed.

As a result, Gibbons and Reed Company suffered substantial damages.

The findings and conclusions of the law entered by the trial court are contrary to the evidence and against law and the judgment should be reversed with directions to enter judgment for appellant, or to make additional findings, or to grant a new trial.

Respectfully submitted,

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