1979

Cliff Prince, Dba Prince Construction Company v. R. C. Tolman Construction Company, Inc v. Western Surety Company, Inc. v. Genevieve A. Prince : Answering Brief of Respondent Cliff Prince, Dba Prince Construction Company

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY,

Plaintiff and Respondent,

vs.

R. C. TOLMAN CONSTRUCTION COMPANY, INC.,

Defendant, Third Party Plaintiff and Appellant,

vs.

WESTERN SURETY COMPANY, INC.,

Third Party Defendant, Fourth Party Plaintiff and Respondent,

vs.

GENEVIEVE A. PRINCE,

Fourth Party Defendant and Respondent.

Case No. 16220

ANSWERING BRIEF OF RESPONDENT CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY, Plaintiff and Respondent, vs. R. C. TOLMAN CONSTRUCTION COMPANY, INC., Defendant, Third Party Plaintiff and Appellant, vs. WESTERN SURETY COMPANY, INC., Third Party Defendant, Fourth Party Plaintiff and Respondent, vs. GENEVIEVE A. PRINCE, Fourth Party Defendant and Respondent.	ANSWERING BRIEF OF RESPONDENT CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY Case No. 16220

On Appeal From the Second Judicial District Court
In and For Davis County, Utah

The Honorable Thornley K. Swan

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IN THE SUPREME COURT OF THE STATE OF UTAH

ANSWERING BRIEF OF RESPONDENT
CLIFF PRINCE, dba PRINCE CONSTRUCTION COMPANY

STATEMENT OF THE NATURE OF THE CASE

The above-entitled action was commenced by the Plaintiff-Respondent CLIFF PRINCE, hereinafter "PRINCE", doing business as the Prince Construction Company to recover damages from the Defendant R. C. TOLMAN CONSTRUCTION COMPANY, INC., hereinafter "TOLMAN". The action arose out of the relation between PRINCE and TOLMAN as subcontractor and general contractor, respectively, of the Fishlake Sanitation District Project near Richfield, Utah. PRINCE was awarded judgment against TOLMAN in the approximate amount of $18,000 as damages resulting from TOLMAN's breach of an agreement made by and between the parties in connection with certain aspects of the construction project.

DISPOSITION IN LOWER COURT

The above-entitled matter, pursuant to the stipulation of parties at pretrial, was bifurcated for purposes of trial. Issues relating to liability between the parties were tried before the Court, sitting without jury, on April 27 and 28, 1977. After hearing the evidence and argument of the parties, the Court found in favor of PRINCE and against TOLMAN, both as to its liability to PRINCE and on its Counterclaim. The

matter was subsequently set down for trial on the issue of damages and was heard by the Court on March 24, 1978. Thereafter, the Court took the matter under advisement and on November 30, 1978 entered written findings and conclusions of law granting PRINCE judgment against Defendant TOLMAN in the amount of $18,386.34.

TOLMAN also joined Western Surety Company, Inc., the surety for PRINCE on the project, on its Counterclaim. Western Surety cross-claimed against PRINCE and joined Genevieve A. Prince as general indemnitor under the bond issued by Western Surety. The trial court, finding that there were no breaches by Respondent PRINCE, dismissed TOLMAN's Counterclaim against PRINCE and Western Surety. Appellant TOLMAN is not appealing the findings of the trial court relating to the dismissal of its Counterclaim and consequently Western Surety and Genevieve Prince are not Respondents to this appeal and are not before this Court.

RELIEF SOUGHT ON APPEAL BY TOLMAN

The Appellant TOLMAN seeks a reversal of the judgment entered against it in the sum of $18,386.34 or, in the alternative, seeks a remand of the matter back to the trial court for recomputation of the damages awarded to PRINCE.

STATEMENT OF FACTS

(Preliminary Statement)

The Statement of Facts set out in Appellant's Brief is prefaced by Appellant's statement that "the facts of the case are basically set forth in the findings of fact and conclusions of law entered by the trial court". The Appellant nevertheless, without challenging the findings of fact made by the trial court, sets out a version of facts which misstates the evidence and findings made by the Court and which contain matters entirely irrelevant to issues presented by this appeal. As a result, Respondent PRINCE is constrained to set out with care a statement of the relevant and material facts as found by the trial court below.

The issues tried before the trial court fell into two categories: PRINCE's claim for damages under an oral agreement between PRINCE and TOLMAN; and TOLMAN's Counterclaim which was eventually dismissed after trial. The award of damages to PRINCE was based upon an oral agreement reached between PRINCE and TOLMAN relating to three items under the subcontract between PRINCE and TOLMAN. The Court found the existence of the oral agreement and also that TOLMAN was estopped to deny the agreement and its enforcement.

It does not clearly appear whether TOLMAN appeals the findings of the trial court relating to the

making of the agreement and the liability issues found in favor of PRINCE and against TOLMAN.[1/] TOLMAN also does not appeal the dismissal of its Counterclaim as against PRINCE and Western Surety.

The following statement of facts sets out the general background relating to the contract between PRINCE and TOLMAN and those facts which related to the award of damages in favor of PRINCE.

(Fishlake Project and Subcontract)

On September 25, 1972, TOLMAN was awarded a contract by the United States Department of Agriculture Forest Service hereinafter "Forest Service", to perform work in connection with the construction of a sewage transmission line with attendant lift stations, vaults and service road at Fishlake in Sevier County, State of Utah. The myriad items under the

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1/ Throughout its brief and particularly on page 6, TOLMAN makes reference to oral statements made from the bench by the trial court, evidently treating the statements as the court's findings. The court did make statements relating to its findings from the bench. However, after further argument and the submission of proposed findings of fact from all parties, the court entered formal written findings of fact on November 30, 1978 (R.150-154). The written findings entered by the trial court supersede any oral statements made by the court and reliance, if any, by TOLMAN on those statements is misplaced. See Newton v. State Road Comm'n, 23 Ut.2d 350, 463 P.2d 565 (1970); In Re Astill's Estate, 14 Ut.2d 217, 381 P.2d 95 (1963); Park v. Jameson, 12 Ut.2d 141, 364 P.2d 1 (1961); In Re Roth's Estate, 2 Ut.2d 40, 269 P.2d 278 (1954); McCollum v. Clothier, 241 P.2d 468 (1952).

prime contract were either lump sum or, in most cases, unit price items. The total contract price subject to unit price quantity changes was set at $630,585. At the end of the contract, however, due to change orders and quantity changes, TOLMAN actually received in excess of $1 million under the contract with the Forest Service.

On October 7, 1972 PRINCE and TOLMAN entered into a subcontract agreement.[2/] Under the terms of the subcontract, PRINCE agreed to perform eleven items under the prime contract between TOLMAN and the Forest Service. Each of the eleven items referred to the prime contract by unit number and the Forest Service specifications were incorporated by reference into the subcontract between PRINCE and TOLMAN. The subcontract between PRINCE and TOLMAN utilized the unit prices contained in the prime contract and set out estimated quantities for each of the eleven items. The items contained in the subcontract between PRINCE and TOLMAN are set out here for the convenience of the Court:

APPROXIMATE QUANTITY	UNIT	ITEMS WITH UNIT PRICES WRITTEN IN WORDS	UNIT PRICE	APPROXIMATE AMOUNT
42,000 C.Y.	2221-1	Excavate and Waste (Lagoons)	.80	33,600.00
17,500 C.Y.	2221-2	Embankment (Lagoons)	.30	5,250.00

2/ Trial Ex. Plaintiff's "A", R.l.

APPROXIMATE QUANTITY	UNIT	ITEMS WITH UNIT PRICES WRITTEN IN WORDS	UNIT PRICE	APPRO AMO
1,500 Cu.Y.	2805-1	Topsoil Furnished (Lagoons)	1.30	1,95
125 M.G.	2231-1	Watering (Road, Lagoons, Misc.)	60.00	7,50
80 Hours	2232-1	Rolling (Road, Lagoons, Misc.)	20.00	1,60
3 Each	2718-1	Intercepting Dip	25.00	7
1,650 C.Y.	2220-1	Roadway Excavation (Road)	.50	82
2,588 C.Y.	2222-1	Borrow (Road)	.90 3/	2,32
25,880 Sta.Y.	2230-1	Overhaul (Road)	.60	15,52
15,100 Yd.Mi.	2230-2	Overhaul (Road)	1.00	15,10
700 C.Y.	2240-1	Crushed Aggregate Grading C (Road)	5.00	3,50
				87,25
		Less 10% to R. C. Tolman		8,72
				78,52

The total subcontract price subject to adjustment based upon changed quantities was the sum of $87,257.20 less 10% of that amount which was to be paid to TOLMAN as the general contractor.

3/ The .90 figure for item 2222-1 was a typographical error and was recognized by the parties as actually $4.00 per yd. Tr. 137.

In October of 1972, PRINCE commenced work under the subcontract. PRINCE and his crew worked through the fall of 1972, stopping and commencing work as the weather permitted in accordance with Forest Service work stoppage and start-up orders of general applicability to the job site. By August of 1973, PRINCE had made substantial progress toward the completion of most items under the subcontract.

(Oral Agreement Between PRINCE and TOLMAN)

The basis of the proceedings below related to three items under the subcontract between PRINCE and TOLMAN; item nos. 2222-1, 2230-1 and 2230-2. The above three items are related, that is, they are performed by the contractor through the same operation. Item 2222-1 involves the excavation of the earth and items 2230-1 and 2230-2 involve the method of computation of payment for the distances over which the earth must be hauled. The three items are highly profitable and are sometimes referred to as "loaded items".

Throughout the early summer of 1973, PRINCE was delayed in performing the three items by virtue of the fact there was an open trench adjacent to the road along which the earth was to be hauled. TOLMAN had informed PRINCE that the hauls and borrow could not be completed until the trench was filled. By August of 1973 work under the three items was ripe for commencement. In order to perform the work, it was necessary for PRINCE to make arrangements for trucks, related equipment and operators.

At that time, PRINCE did not have sufficient equipme on the job site in order to commence the overhaul under thos items. Knowing that, PRINCE contacted Don Wirthlin, a licen engineering contractor. Wirthlin agreed to supply dump truc to PRINCE and operators in order to complete the haul. The haul involved the moving of approximately 2,500 cubic yards earth from a point specified by the Forest Service along a road and dropping the earth at various intervals. For the supplying of the trucks and operators, Wirthlin agreed with PRINCE that he would charge a flat sum of $3.00 per cubic yard of earth moved without regard to station or mile yards. The cost approximated $7,500.[4/] Under that arrangement, PRINC stood to profit by approximately $30,000 on the three items.

In mid-August of 1973, PRINCE together with Ward Ragner, an employee, met with R. C. Tolman, the President of the Tolman Construction Company, at the job site at Fishlake PRINCE informed TOLMAN that he was ready to commence work on the three items. PRINCE explained to TOLMAN that he had made arrangements for trucks and operators through Don Wirth TOLMAN then asked PRINCE what Wirthlin was charging for the use of the trucks and operators. PRINCE responded that Wirthlin was charging the sum of $3.00 per cubic yard. TOLMAN then told PRINCE that he could perform the work

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4/ Trial Transcript 97-102.

cheaper since he had idle trucks and operators which could be utilized in order to make the haul and that TOLMAN would charge PRINCE only $3.00 per cubic yard, the price to which Wirthlin had agreed. It was agreed by the parties that TOLMAN, utilizing his trucks and operators, would proceed to make the haul and that the cost of $3.00 per cubic yard would be charged against the sum due PRINCE under the contract.[5/]

Immediately subsequent to that conversation with TOLMAN, PRINCE contacted Don Wirthlin and told him that it would be unnecessary for him to perform the work they had discussed relating to the three items. PRINCE then set out to perform other items under the contract, and, on the basis of his agreement with TOLMAN, PRINCE fully expected that the work would be performed by TOLMAN and that $3.00 per cubic yard would be charged against those items and PRINCE would receive the difference between the contract price and the $3.00 per cubic yard which was to be charged by TOLMAN. In September of 1973, TOLMAN performed the overhaul on the three items utilizing his idle trucks and machinery.

TOLMAN subsequently submitted requests for payment under those items to the Forest Service and was paid an aggregate amount of $52,000, a sum which exceeded the original

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5/ R.30-31· Trial Court's Findings of Fact, Paragraphs 6-7.

contract price due to changed quantities. PRINCE made claim against TOLMAN for payment under the subcontract as modified by their oral agreement. TOLMAN, however, refused to pay PRINCE, claiming that PRINCE had not performed the items and therefore was not entitled to payment.

At trial, TOLMAN denied that he had made the oral agreement with PRINCE relating to the three items on the job site in August of 1973. The trial court specifically found, based upon the testimony of witnesses and the circumstances surrounding the agreement, that TOLMAN did, in fact, make such an agreement and that, additionally, he was estopped to deny the existence of the agreement.[6/] Based upon those findings, which are not appealed by TOLMAN, the Court found that PRINCE was entitled to damages against TOLMAN for TOLMAN's breach of the contract based upon the difference between the subcontract price and TOLMAN's actual cost in performing the three items.

6/ During the course of trial, Respondent PRINCE elicited testimony from TOLMAN that TOLMAN had in his original bid to the Forest Service utilized profit margins in items 2222-1, 2230-1 and 2230-2 to offset costs of another item. (Tr. 186-187). Respondent PRINCE argued to the trial court that toward the end of the project TOLMAN recognized the relation between the three items and the subsidized item and was thus motivated to withhold payment to PRINCE. The trial court, however, declined to make a finding of bad faith on TOLMAN's part.

(Damages)

The findings entered by the trial court below set out with detail the specific elements used by the trial court in its award of damages to Respondent PRINCE. The findings entered by the trial court are not disputed by TOLMAN.

ARGUMENT

(Preliminary Statement)

The legal arguments set out in the three points of TOLMAN's brief are based upon erroneous factual premises. Each point assumes the validity of TOLMAN's factual claims at trial manifestly ignoring the findings of fact made and entered by the trial court.

It is difficult for Respondent PRINCE to know, based upon the Brief of Appellant TOLMAN, the issues from which TOLMAN appeals. TOLMAN conced in his Brief that the facts are as found by the trial court and entered in the trial court's findings. Appellant TOLMAN claims that he appeals only the application of quantum meruit to the case and evidently disputes the measure of damages applied by the trial court. Despite those statements, TOLMAN sets out facts and arguments which have little or nothing to do with the theory of liability or the measure of damages applied by the trial court. In order to put the case in perspective and to align the issues it is necessary for Respondent PRINCE to set out the basic theory of liability upon which the Court awarded judgment in favor of PRINCE.

POINT I

THE TRIAL COURT PROPERLY FOUND AN ORAL AGREEMENT BETWEEN PRINCE AND TOLMAN

(Oral Agreement Between PRINCE and TOLMAN)

Prior to August of 1973, the written subcontract between PRINCE and TOLMAN provided that PRINCE would perfor the work under items 2222-1, 2230-1 and 2230-2. Those three items were critical to PRINCE since, as he testified at tria they were "loaded items" [7/] bearing significant profit which offset losses on other contract items. PRINCE had experienc some delay caused by TOLMAN in performing the three items. Believing that the equipment he had on the job site would be occupied in the lagoon area, PRINCE made the arrangement wit Don Wirthlin to supply the trucks and operators necessary to make the haul under the three items. PRINCE went to TOLMAN and explained his arrangements with Wirthlin to make the hau TOLMAN agreed at that time that he would make the haul at a price equal to or less than that of Wirthlin.

At that time, PRINCE and TOLMAN entered into an oral agreement which modified the written subcontract. TOLMAN agreed to perform the work under those items and in so doing stepped into the shoes of Wirthlin, with respect to his relationship with PRINCE. Effectively, TOLMAN became PRINCE subcontractor.

7/ R.225-227.

At the time of trial, Defendant TOLMAN suggested that the oral agreement, if made, was barred by the provisions of paragraph 10 of the subcontract which stated that the terms of the subcontract could only be changed or modified by a written agreement and that written consent to assign or further subcontract was required under paragraph 6 of the subcontract. This Court, however, in a number of decisions has held that parties to a written contract may orally change or modify the terms of the written contract.[8/] As this Court stated in Davis v. Payne and Day, Inc., 10 Ut.2d 53, 348 P.2d 337, 339 (1960):

> It is a well-established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom.

Favorably citing Davis v. Payne and Day, Inc., this Court in PLC Landscape Const. v. Piccadilly Fish 'N Chips, Inc., 502 P.2d 562 (1972) stated:

> . . . there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification,

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8/ Wilson v. Gardner, 10 Ut.2d 89, 348 P.2d 931 (1960); Salzner v. Jos. J. Snell Estate Corp., 81 Ut. 111, 16 P.2d 923 (1973). See also, Kenison v. Baldwin, 351 P.2d 307 (Okla. 1960); Canada v. Allstate Insurance Company, 411 F.2d 517 (5th Cir. 1969).

> extension or addition to their arrangement for doing business with each other that they may mutually agree. PLC at 563.

The court below found that PRINCE and TOLMAN entered into an oral agreement which modified the subcontract agreement. TOLMAN was to perform the work under items 2222-1, 2230-1 and 2230-2 and charge $3.00 per cubic yard against the price due PRINCE under the contract. PRINCE performed under the subcontract and was entitled to receive its benefits. TOLMAN, as prime contractor, collected the sums due under the three items but refused to disburse to PRINCE in accordance with the subcontract thereby breaching the agreement.

(Promissory Estoppel)

The trial court also made findings and entered conclusions of law bearing on the issue of promissory estoppel. While the court found that an agreement had been reached between PRINCE and TOLMAN relating to the three items, the court also found that the strict elements of a contract need not be met in order to entitle PRINCE to judgment.

The court found that TOLMAN promised PRINCE that he would perform the work under the three items at a cost equal to that of the Wirthlin bid. That promise was made by TOLMAN with the reasonable expectation that PRINCE would forbear. In justifiable reliance on TOLMAN's promise, PRINCE did forbear, not only by terminating the arrangements with Wirthlin but by taking no action himself. After making the promise, TOLMAN

performed the work under the items, collected payment as the general contractor from the Forest Service and refused to pay PRINCE under the agreements.

The trial court held that TOLMAN was estopped to deny the existence and enforceability of the oral agreement with PRINCE and his relationship as PRINCE's subcontractor. In so holding, the court relied upon a number of decisions in this court applying the doctrine of promissory estoppel.[9/] The basis of the application of the doctrine is set out in Section 90 of the American Law Institute's Restatement of Contracts which has been cited with approval by this court.[10/] Section 90 of the Restatement provides as follows:

> PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION.
>
> 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 forbearance is binding if injustice can be avoided only by enforcement of the promise.

The trial court found in favor of PRINCE on each of the elements necessary under Restatement 90 to assert promissory estoppel. TOLMAN made a promise reasonably expecting to induce forbearance of a substantial character; PRINCE reasonably

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9/ J. P. Koch Inc. v. J. C. Penney Co., Inc., 534 P.2d 903 (1975); Baggs v. Anderson, 528 P.2d 141 (1974); Kelly v. Richards, 83 P.2d 731 (1938).

10/ Baggs v. Anderson, Id. at 143 n. 5.

relied, forbearing on the performance to his detriment; an avoid injustice the court enforced TOLMAN's promise.

Articulating the principle contained in Restatemen this Court in J. P. Koch Inc. v. J. C. Penney Co., Inc., s fn. 9, stated:

> The invocation of estoppel does not necessarily involve any contract or agreement between the parties, consequently, the elements of a contract are not involved and there is no requirement of consideration. It is a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. As applicable here, the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

This Court's analysis in Koch that the doctrine of promissory estoppel can be invoked without regard to the limitations imposed by traditional contract law has also be followed in other jurisdictions.[11/]

Thus, the trial court made a two-prong finding. It found, first, that a contract did exist between PRINCE and TOLMAN under which TOLMAN was to perform the haul as PRINCE subcontractor, and, secondly, that in any case, TOLMAN, by

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11/ See, Janke Const. Co., Inc. v. Vulcan, 527 F.2d 772 (7 Cir. 1976); Hoffman v. Red Owl Stores Inc., 133 N.W.2d 267 (Wis. 1965).

virtue of his conduct, was estopped to deny the existence of the agreement with PRINCE and that it was not in writing in compliance with paragraphs 2 and 6 of the subcontract agreement. The trial court, having found that TOLMAN was liable to PRINCE under the oral agreement, then considered the award due PRINCE by virtue of TOLMAN's breach.

POINT II

THE TRIAL COURT PROPERLY AWARDED JUDGMENT IN FAVOR OF RESPONDENT PRINCE

Points II and III of TOLMAN's Brief appear to address the issue of the measure of damages utilized by the trial court in awarding judgment to PRINCE. Since the two points are so substantially related and since they both are based upon the same erroneous premise, Respondent PRINCE will treat both points concurrently.

(Computation of Damages by Trial Court)

The trial court, having once found that TOLMAN breached the oral agreement with PRINCE, awarded judgment to PRINCE in the sum of $24,316.33, less certain offsets, which reduced the judgment to approximately $18,000. At trial, Respondent PRINCE urged that the measure of damages should be as stated by the court in Keller v. Deseret Mortuary Company [12/] "that the non-breaching party should receive an award which will put him in

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12/ 23 Ut.2d 1, 455 P.2d 197, 198 (1969).

as good a position as he would have been in had there been n breach". That is, Respondent urged the trial court to awar the contract price to PRINCE less the $3.00 per cubic yard agreed to by TOLMAN.[13/] The trial court, however, declined to hold TOLMAN to the $3.00 per cubic yard price. Rather, the trial court awarded PRINCE the subcontract price on the thre items less TOLMAN's actual cost of performance of those ite

Additionally, the trial court refused to award PRIN increases in those quantities above the original estimates. Thus, the trial court found that the contract price to whic PRINCE was entitled was the sum of $39,586, the aggregate o items 2222-1, 2230-1 and 2230-2. The court then subtracted from that figure the sum of $15,269 which TOLMAN testified his actual cost in performing the three items. The remaind yielded the sum of $24,316.33. Consistent with the subcont agreement, the court reduced the $24,316.33 by 10%, the general contractor's share. The court also allowed offsets in favor of TOLMAN, on other items, the total of which, including the 10% reduction, equalled $5,929.99. That figu when subtracted from the $24,316.33 resulted in the final judgment of $18,386.34 awarded to PRINCE.

13/ Additionally, PRINCE proffered testimony, which was excluded by the trial court, demonstrating consequential damages in view of the breach by TOLMAN. The court found those damages to be unforeseeable by the parties.

(Measure of Damages)

The trial court applied the generally accepted measure of damages in a contract case. That is, it awarded to PRINCE the sum to which he was entitled -- the contract price. Indeed, for purposes of the relations of the parties, PRINCE's contract was performed and he was entitled to the contract price. Section 346(2) of the Restatement of Contracts states that rule:

> (2) For a breach by one who has promised to pay for construction, if it is a partial breach the builder can get judgment for the instalment due, with interest; and if it is a total breach he can get judgment, with interest so far as permitted by the rules stated in §337, for either
>
> (a) the entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less instalments already paid and the cost of completion that the builder can reasonably save by not completing the work; or
>
> * * *

This Court reiterated that rule in Holman v. Sorenson, 556 P.2d 499 (1976):

> It is the undisputed law of this state and the general consensus of legal writers that breach of a construction contract damages are based upon the total amount promised for the project, less the reasonable cost of completing it.

While TOLMAN had promised to complete the three ite for $3.00 per cubic yard, he claimed his actual cost to be times that figure. TOLMAN has complained that the trial co utilized quantum meruit improperly. However, any error in that regard inured to the benefit of TOLMAN. That is, the trial court allowed TOLMAN's actual cost to be offset agains the contract price, rather than holding him to his agreement at $3.00 per cubic yard. The trial court's references to quantum meruit were strictly in an attempt to allow TOLMAN his actual costs.

(Appellant TOLMAN Urges the
Application of an Inapposite Rule)

TOLMAN's entire argument with respect to the assessm of damages is based on an erroneous factual predicate. TOL contrary to the findings entered by the trial court, assume that TOLMAN, under paragraph 2 of the subcontract, took over the three items because of the default of PRINCE. The entir argument advanced in the brief flows from that proposition. The cases cited by Appellant have application to that circumstance. Had the trial court so found, the cases cite by TOLMAN would have colorable pertinence. They are, howeve irrelevant.

The trial court found that PRINCE performed under th subcontract through TOLMAN as his subcontractor under an ora agreement. It appears that the gravamen of Appellant's

complaint is that PRINCE should not have received the award because he did not perform the work under the three items. That proposition, however, ignores the promises and agreement of TOLMAN and the damages which resulted to PRINCE occasioned by TOLMAN's own conduct. Appellant cannot be heard to complain about the court's utilization of quantum meruit which clearly benefited TOLMAN.

CONCLUSION

The issues and arguments advanced by the Appellant substantially deviate from the issues tried and resolved by the trial court. As a result, meaningful response to those arguments is substantially impeded. Nevertheless, Respondent has set out the theory and basis of the trial court's ruling and its award of damages, both of which are supported by the record. TOLMAN entered into an oral agreement with PRINCE to which he must and should be held. The trial court so found and should be affirmed.

Respectfully submitted,

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CONSTRUCTION COMPANY

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Answering Brief of Respondent Cliff Prince, dba Prince Construction Company was mailed this 12th day of October, 1979, to Don R. Strong, Esq., STRONG & MITCHELL, Attorneys for Appellant R. C. Tolman Construction Company, Inc., 197 South Main Street, P. O. Box 124, Springville, Utah 84663.