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NOVA SCOTIA COURT OF APPEAL
Cite as: Seabord Construction Inc. v. Atlantic Canada Opportunities Agency, 1998 NSCA 22

Clarke, C.J.N.S., Hart, Freeman, JJ.A.

BETWEEN:

SEABORD CONSTRUCTION INCORPORATED and SEABORD CONSTRUCTION LIMITED	
Appellants	William L. Ryan, Q.C. Virve Sandstrom for the Appellants
- and -	
ATLANTIC CANADA OPPORTUNITIES AGENCY	
Respondent	Martin Ward Michael Donovan for the Respondent
	Appeal Heard: January 8, 1998
	Judgment Delivered: February 6, 1998

THE COURT: The appeal is allowed as to costs at trial, reducing them from $55,373 plus disbursements to $25,000 plus disbursements; appeal dismissed with costs against the appellant fixed at $5,000; per reasons for judgment of Freeman, J.A., Clarke, C.J.N.S. and Hart, J.A. concurring.

FREEMAN, J.A.:

The main issue in this appeal is whether a federal agency which provided financial assistance to a new industrial undertaking owed a duty of care to contractors which lost heavily when the enterprise foundered during the construction phase.

A major contract for the refit of the Canadian Coast Guard Ship "Louis St. Laurent" went to tender in 1987 and the German manufacturer Krupp Mak Machinebau GmbH won a $26,400,000 subcontract for the new diesel electric propulsion system.

The subcontract requirement for 50 per cent Canadian content could only be satisfied if certification testing of the new engines could be carried out in Canada, but no adequate facilities existed. To remedy the problem Frederick Black, Krupp's North American representative, undertook to build and operate appropriate facilities on his own behalf, but with Krupp's involvement. He incorporated NsC Corporation as a holding company and NsC Diesel Power Inc. as the operator and acquired a site in an industrial mall at Sheet Harbour, N.S. In anticipation that Krupp would participate in the equity financing he applied to the Atlantic Canada Opportunities Agency for funding. In November, 1988, ACOA offered NsC a repayable loan of $6,300,000 and a loan guarantee or insurance in an equal amount, conditional on Krupp's participation. The project went ahead.

Seabord Construction Incorporated, Nova Scotia subsidiary of Seabord Construction Limited of Newfoundland, won three contracts with NsC Diesel for design

and construction totaling $4,500,000. Construction began in April, 1989. Initial billings were paid but by August, 1989, problems were apparent. Krupp was not participating and ACOA refused further advances. Seabord ceased work in September, 1989, and filed a lien against NsC Diesel. Seabord's work was then 90 per cent complete and it was owed $2,755,000. NsC Diesel went bankrupt early in 1990.

Seabord sued ACOA, claiming breach of a duty of care and alternatively, negligent misrepresentation. The action was tried on the issue of liability alone before Justice Boudreau of the Supreme Court of Nova Scotia. This appeal is from the dismissal of Seabord's claim.

John Small, president of both Seabord companies, testified that he was encouraged to tender because of ACOA's involvement, which he knew of from newspaper articles and a sign at the site.

In his review of the evidence Justice Boudreau observed:

> What is clear, however, is that Mr. Small did not at any time contact ACOA to attempt to confirm ACOA's involvement or any details of ACOA's or others' funding arrangements. . . . No one on behalf of Seabord made any direct inquiries of ACOA to attempt to determine ACOA's position or continued participation in the project.

He found "there were no untrue statements made by ACOA and there were no negligent statements made by ACOA to Seabord." The news releases and the site sign "were

not untrue and they were not negligent. Those representations cannot in any way be reasonably interpreted as guaranteeing payment of the construction costs to contractors such as Seabord." He also found there was no reliance on the ACOA progress payment by Seabord in order to continue the work. He dismissed Seabord's claim on the alternate ground of negligent misrepresentation.

In considering the duty of care Justice Boudreau referred to the evolution of the concept in the case law and cited the two-step approach set forth by Lord Wilberforce in his well known judgment in **Anns v. London Borough of Merton,** [1977] 2 All E.R. 492 (H.L.):

> . . . the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

Justice Boudreau noted that there are "no general formulas designed or approved by the authorities which can tell us what is a sufficient relationship or proximity to give rise to a duty of care in any given circumstances."

> It is also accepted and would appear to be the simple application of common sense and logic that it need not be stated that one cannot impose liability on another by simply choosing to rely on the other. This was clearly stated in the case of **McGauley v. B.C.** (1990) 44 B.C.L.R. 217 (B.C.S.C.) by Huddart, J., at page 232:
>
> > One cannot impose liability on another simply by

> choosing to rely upon him. Nor will knowledge that one is being relied on be enough to create liability. The reliance must derive reasonably from the relationship said to be proximate if it is to create a duty of care.

Justice Boudreau found:

> In my view, the proximity between ACOA and independent contractors on a project performing work for the owner or owners is not sufficient to create a duty of care to those contractors.

While such a finding is entitled to deference by an appeal court in the absence of error of law or manifest error in assessing the facts, in the circumstances of the present case it is not necessary to rely on deference. Justice Boudreau's analysis is accurate and his conclusions are correct. He continued:

> Seabord did not take any reasonable steps to protect its interests during the construction phase of this project.
>
> I, therefore, find ACOA did not owe a duty of care to Seabord in the present circumstances. I also find that any reliance by Seabord on ACOA to somehow protect it from losses was not reasonable in the circumstances. . . . Simple reliance on ACOA by Seabord, which I find was unreasonable, could not impose liability on ACOA.

There was considerable evidence before Justice Boudreau as to ACOA's mandate, which was to stimulate regional economic activity by providing assistance to enterprises which did not qualify for loans from conventional institutions. He found:

> . . . that the purpose of the governing legislation is not the protection of general contractors from losses on development projects. Nor was ACOA's statutory mandate to prevent projects in which it became involved from failing, at any stage.

That is, ACOA's involvement did not relieve Seabord of the need to know its own customer or to make independent business decisions based on its own data. I am not persuaded by submissions to the contrary on behalf of the appellant.

There is a further issue in this appeal as to costs. In dismissing the claims Justice Boudreau awarded costs against Seabord of $55,375 plus $3,000 disbursements after a separate hearing. The amount involved appears to have been based on the $2,750,000 left owing on the contracts. The cost award was appropriate to the trial of an action of that magnitude, but in my view it was wrong in principle and inordinately high when only liability was decided. The assessment of damages might have been equally complex and time consuming because the plaintiff was claiming special damages for closing down Seabord's local office and general damages for loss of expected profits, office disruption, loss of management time and loss of ability to bid on major projects because of the unavailability of bonding, as well as punitive damages. Costs totalling well over $100,000 in a relatively straightforward matter would appear to be excessive. While I am mindful of the deference owed to a trial judge's discretion as to costs, in my view the severance of liability and damages justifies intervention in the present circumstances. I would allow the appeal as to costs and reduce them to $25,000 plus disbursements of $3,000.

I would therefore allow the appeal as to costs at trial, reducing them from $55,373 plus disbursements to $25,000 plus disbursements. I would otherwise dismiss the

appeal with costs against the appellant fixed at $5,000.

Freeman, J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

C.A. No. 132056

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SEABOARD CONSTRUCTION INCORPORATED and SEABOARD CONSTRUCTION LIMITED Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
ATLANTIC CANADA OPPORTUNITIES AGENCY	)	
	)	FREEMAN, J.A.
Respondent	)	