

NOVA SCOTIA COURT OF APPEAL

Citation: *Hatch Ltd. v. Factory Mutual Insurance Company*, 2014 NSCA 112

Date: 20141127

Docket: CA 429986

Registry: Halifax

Between:

Hatch Ltd., a body corporate formerly known as SGE Acres Limited,
Appellant

- and -

Factory Mutual Insurance Company, a body corporate, Martin
Marietta Materials Canada Limited, a body corporate, Birmingham
Construction Limited, Atlantic Sub-Sea Construction and Consulting
Incorporated, Beaver Marine Limited, a body corporate, and
Dywidag Systems International Canada Ltd., a body corporate
Respondents

Judge: The Honourable Chief Justice Michael MacDonald, C.J.N.S.

Motion Heard: November 27, 2014, in Halifax, Nova Scotia in Chambers

Written Decision: December 10, 2014

Held: The respondent Factory Mutual Insurance Company's motion is granted and the appellant Hatch Ltd.'s counter motion is dismissed with combined costs of \$750 plus disbursements.

Counsel: Gordon F. Proudfoot, Q.C. and Doug W. Schpilow, for the appellant Hatch Ltd.
Leon S. Tovey appearing on behalf of David A. Cameron, for the respondents Factory Mutual Insurance Company and Martin Marietta Materials Canada Limited

Harvey L. Morrison, Q.C., for the respondent Beaver Marine Limited (not present)

Robert M. Purdy, Q.C., for the respondent Dywidag Systems International Canada Ltd. (not present)

Michael Dunphy, Q.C., for the respondent Bermingham Construction Ltd. (not present)

Murray Ritch, Q.C., for the respondent Atlantic Sub-Sea Construction and Consulting Incorporated (not present)

Decision:

[1] The parties to this leave to appeal motion (scheduled to be heard next month) could not agree on the contents of the appeal book. By way of reciprocating motions, they asked me to resolve the matter. This I did by way of verbal directions following a contested hearing last week. At that time, I committed to filing written reasons. Here they are.

Background

[2] In the fall of 2008, a commercial wharf, located in Auld's Cove (near the Canso Causeway) partially collapsed. This prompted its owner, the respondent Martin Marietta Materials Canada Limited and its insurer, the respondent Factory Mutual Insurance Company, to take action against several defendants. One such defendant is the appellant Hatch Limited, which designed the wharf.

[3] In the course of the litigation, Hatch sought but was refused certain disclosure from various parties. These issues made their way to Justice Denise Boudreau of the Nova Scotia Supreme Court. There, Hatch asked the judge to direct Martin Marietta, Factory Mutual and another party, Beaver Marine Limited, to produce various documents. From my limited record, it appears that the Beaver Marine production issue evaporated, leaving only the Martin Marietta and Factory Mutual issues for resolution by the motions judge. Specifically, Hatch sought (a.) clean copies of documents that Martin Marietta and Factory Mutual had redacted (as being either irrelevant or subject to solicitor client privilege) and (b.) materials prepared by Factory Mutual's expert over which Factory Mutual claimed litigation privilege.

[4] Although the motions were filed separately, the motions judge heard them together and filed one decision. In that decision, she succinctly identified the issues before her:

¶6 At the end of the day, the Court was left with decisions to make in relation to two general areas. Firstly, both motions referred to redactions that had been made in documents. The redactions made, were noted to be either solicitor-client or "irrelevant". The applicant was not satisfied that these redactions had been properly made and therefore the Court was asked to review and consider them.

¶7 In the case of both motions, the respondents provided the Court with sealed envelopes containing unredacted versions of the same documents and I have reviewed them. I shall provide my decisions with respect to these redactions, first with respect to the Martin Marietta documents, and secondly with respect to the Factory Mutual documents.

¶8 The second issue is in relation to documents held by Factory Mutual. Soon after the collapse, Factory Mutual Insurance retained an engineering firm called “SDK”. As I understand it, there is no report yet from SDK, but there are materials prepared, in the possession of FMI from this engineering firm. Factory Mutual claims litigation privilege with respect to this particular material.

[5] In her decision, the judge dealt with the various redactions and the parties have accepted that outcome. She then sustained Factory Mutual’s claim of litigation privilege over the material produced by its expert. This latter ruling has prompted the present leave to appeal motion.

The Disputed Documents

[6] Hatch filed its appeal book in late September of this year. While it acknowledged some shortcomings, it resisted filing other documents that Factory Mutual felt necessary. This led to much correspondence among the lawyers; correspondence that also unfortunately drew court staff into the mix.

[7] Matters came to a head when Factory Mutual filed a motion to settle the issue. This prompted Hatch to file a counter motion seeking essentially the same relief. By the time the matter came before me, the list of disputed items was whittled down to these four:

1. an affidavit filed by Hatch’s counsel, Mr. Gordon Proudfoot, Q.C.,
2. an affidavit filed by Ms. Helen Haynes, Martin Marietta’s in-house counsel,
3. Hatch’s pre-motion brief, and
4. Martin Marietta’s and Factory Mutual’s combined pre-motion brief.

[8] I will now deal with each disputed document in order.

The Proudfoot Affidavit

[9] Mr. Proudfoot actually filed three affidavits before the motions judge. The first was dated April 7, 2014, and supported its motion to have the respondent's expert report produced. Hatch agrees that this should have been filed with the Court, as it is directly relevant to this appeal. He filed a second affidavit, also dated April 7th. It supported production of the redacted documents. Martin Marietta/Factory Mutual took exception to certain portions and, as a result, Hatch filed an amended April 15th affidavit, which is the subject of dispute before me. Neither party seeks to file Mr. Proudfoot's April 7th affidavit that initially dealt with the redaction issue.

[10] Hatch insists that its April 15th affidavit was filed exclusively to support the redaction issue and is therefore irrelevant to this appeal. However, it is not that simple in my view. First of all, the judge made reference to this affidavit in her decision without any suggestion that its use was limited to the Martin Marietta issue:

¶3 The documents that were sought by the applicant were listed in Schedule B to each motion. Both matters were heard on April 23 and 24, 2014. In support of the motions were two affidavits of Gordon Proudfoot dated April 7, 2014, and April 15, 2014, the second being an amended affidavit (as a result of discussions between the parties relating to difficulties in the first affidavit).

[11] As well, Hatch acknowledges that this affidavit was referred to by Factory Mutual's counsel in his closing submission on the litigation privilege issue. It nonetheless insists that, because the references were brief, they should not form part of the appeal book.

[12] In my view, any document that was relied upon either by counsel or the judge should be in the appeal book regardless of the extent of the allusion. This contested affidavit should, therefore, be filed.

The Haynes Affidavit.

[13] Ms. Haynes filed two affidavits, one dated April 16th and another dated April 29th. Hatch acknowledges that the April 29th affidavit is directly relevant to this appeal and should have formed part of the appeal book. However, it insists the April 16th affidavit exclusively targets the redaction issue. However, that is simply

not the case. Again, the judge made no such observation as she identified both as documents upon which she relied in reaching her decision. In fact, it is clear from the materials before me that, in the following passage, the judge is referring to the April 16th affidavit:

¶67 The date of the incident was November 14, 2008. The evidence before the Court discloses that both Martin Marietta and Factory Mutual became aware of that incident on that same date. Senior representatives of those companies made visits to the site either that day or the next day. This evidence comes from the affidavits of the adjuster, Mr. Lodge, as well as the affidavit of Helen Haynes, general counsel for Martin Marietta.

[14] Furthermore, this affidavit was referred to several times by Factory Mutual's counsel in his submissions on the litigation privilege issue. In fact, Hatch's own counsel made reference to the affidavit in advancing the motion under appeal. Yet, it still attempts to justify its exclusion:

Second, FMI also claims because Hatch counsel made a passing reference to Ms. Haynes original affidavit that the collapse put Martin Marietta out of business (see Transcript at page 14, line 5). No specific reference was made to the Haynes original affidavit. Certainly nothing turns on this Appeal whether Martin Marietta went out of business or not. This ephemeral reference is no reason to allow two Hatch(sic) affidavits on the Martin Marietta motion into the Supplementary Appeal Book. We consider inclusion as irrelevant and prejudicial to this Appeal.

[15] Again, all documents relied upon by the judge or by counsel should form part of the record regardless of what weight Hatch may think they deserve. Both Haynes affidavits should be filed.

Hatch's Pre-motion Brief

[16] Factory Mutual concedes that the portion of Hatch's pre-motion brief dealing with the Beaver Marine issue should not form part of the appeal book. However, it insists that the remainder represents a blended submission, not easily redacted. Hatch invites me to give the parties more time to attempt redaction. At this late stage, the only plausible solution is to direct production of this blended portion.

The Martin Marietta/Factory Mutual Pre-motion Brief

[17] Again, Hatch invites me to allow the parties time to redact the Martin Marietta/Factory Mutual pre-motion brief. Given the history of this dispute and at this late stage, I am not inclined not do so. I accept the respondent's position that it would not be worth the effort to expunge irrelevant portions, particularly since it was before the trial judge in this same blended fashion. It should be filed in its entirety. After all, it is only 25 pages in length.

Costs

[18] I have accepted Factory Mutual's submissions. Furthermore, Hatch's counter motion before me was redundant and unnecessary. I dismiss it accordingly. For these reasons, Factory Mutual is entitled to its costs on these motions, regardless of the result on appeal. I set a total of \$750 for both motions. Factory Mutual is also entitled to its reasonable disbursements including the cost of producing the supplementary appeal book.

[19] Before concluding, I note that this appeal is being advanced with an improper style of cause. The correct version is used with this decision and corresponding order. The parties are directed to use this revised style of cause going forward in this appeal.

Conclusion

[20] Factory Mutual's motion is granted while Hatch's counter motion is denied. Factory Mutual shall prepare and file a supplementary appeal book containing the following (contested and uncontested) documents:

1. Hatch's Notice of Motion dated March 24, 2014;
2. Justice Boudreau's order dated August 6, 2014;
3. the Affidavit of Gordon F. Proudfoot, dated April 7, 2014;
4. the Affidavit of Gordon F. Proudfoot, dated April 15, 2014;
5. the Affidavit of Helen Haynes, dated April 16, 2014;
6. the Affidavit of Helen Haynes, dated April 29, 2014;
7. Hatch's pre-motion brief, excluding that portion relating to the Beaver Marine production issue;

8. the Martin Marietta/Factory Mutual pre-motion brief;
9. a replacement page correcting what the parties agree represents an error in the transcript.

[21] For its success on both motions, Factory Mutual is entitled to costs of \$750 together with reasonable disbursements, regardless of the result in the appeal.

[22] All subsequent documents shall be filed using the style of cause of this decision and corresponding order.

MacDonald, C.J.N.S.