

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Dexter Construction v. Nova Scotia (Attorney General), 2004 NSSC 267

Date: (20041220)
Docket: SH 165314
Registry: Halifax

Between:

Dexter Construction Company Limited

Plaintiff

v.

The Attorney General of Nova Scotia
representing Her Majesty The Queen in the right of
the Province of Nova Scotia

Defendant

Judge: The Honourable Justice Allan P. Boudreau

Decision On Costs: December 20, 2004

Counsel: George W. MacDonald, Q.C. for the plaintiff
Michael T. Pugsley, for the defendant

INTRODUCTION:

- [1] Dexter Construction Company Limited, (“Dexter”) tendered on a project for highway and bridge repair with the Department of Transportation and Public Works for the Province of Nova Scotia, (“DTPW”). The project was awarded to Dexter, it being the lowest compliant bidder. A contract was entered into between the parties shortly thereafter. A few weeks after the contract was finalized, DTPW became aware that it had made an error in its tendering documents whereby the Dexter bid could cost DTPW additional monies for repairs to the concrete deck on the CNR overpass, (“the Bridge”), portion of the project. Dexter has sued for alleged unpaid concrete removal work, being some \$535,000.00, plus interest.
- [2] DTPW contends that Dexter knew or ought to have known that item 5.13.02 of the amended tender documents entitled, “Concrete Removal on Bridge Decks - Restoration” was in error and that it was an obvious duplicate of item 5.13.08 entitled, “Concrete Bridge Deck Repair”. Dexter bid the first item at \$1,000.00 per unit and the second item at \$140.00 per unit. DTPW has paid for all of the work in question at \$140.00 per unit and Dexter has sued claiming it is entitled to \$1,000.00 per unit in accordance with item 5.13.02 of the contract. A pivotal issue is the state of Dexter’s knowledge

regarding the two items in question at the time of submitting its bid and entering into the contract for the project.

- [3] Dexter was partly successful and recovered one half of the amount claimed on the main contract, plus the amount claimed regarding interest on the hold back, as simple pre-judgment interest and not compound interest as claimed.

ISSUE:

- [4] The dispute is now the amount of costs, if any, to which Dexter may be entitled.

FACTS:

- [5] At trial I found that both Dexter and DTPW were at fault for entering into an ambiguous contract and awarded Dexter one half of the disputed amount on the main contract. I also awarded Dexter interest on the amount improperly held back by DTPW, but only simple interest at the pre-judgment rate and not compound interest at Dexter's bank rate as claimed.
- [6] DTPW now argues that each party should bear its own costs on the main contract claim because liability was more or less divided equally between the parties on that issue.

- [7] DTPW agrees that Dexter should be awarded the usual party and party costs on the hold back interest issue because Dexter was successful on the main question of that dispute.
- [8] On the other hand Dexter contends that it should be awarded party and party costs and that the total amount involved should be set at \$270,786.81, being the amount it recovered on both claims.

ANALYSIS:

- [9] The main argument of DTPW is that because I found both parties at fault for entering into the ambiguous contract, each party should bear its own costs. DTPW equates the outcome of the present case with tort cases involving damages caused to both parties because of their mutual or joint negligence. In those cases it has been held that each party can only recover one half of their costs. In the present case Dexter was claiming approximately \$550,000.00 to \$600,000.00 from DTPW. DTPW was denying any liability whatsoever, but suggested \$50,000.00 may be a reasonable amount as a loss of “reasonable profit” on the amount claimed. No basis was established for DTPW’s position in this regard. Essentially, DTPW’s position was that Dexter was not entitled to any recovery on its claim.

- [10] Dexter has recovered some \$270,000.00 on its claim, plus prejudgment interest. This is certainly not a nominal recovery considering the fact that DTPW was denying all liability. There also was no offer to settle on the part of DTPW, or Dexter, which could be used to vary otherwise appropriate costs.
- [11] Although it is clear that costs are in the discretion of the Court, I find that Dexter is entitled to costs in the circumstances. It was very substantially successful in this litigation. Dexter has claimed \$23,601.14 as its entitlement of costs under the new Tariff. This is based on the total amounts recovered, being \$270,786.81 on both claims. In my opinion, Dexter should be awarded approximately one half of the Tariff costs on the total amount claimed of some \$550,000.00 or its costs on the amount actually recovered, taking into consideration the fact that Dexter was not entirely successful on the hold back interest issue. The new Tariff only applies to actions commenced after September 2004, therefore the old Tariff applies.
- [12] I find that \$10,000.00 plus its disbursements is an appropriate award of costs to Dexter in the circumstances. This is approximately twenty per cent less than the basic Tariff in effect at the relevant time, on the amounts recovered. Dexter has claimed \$2,681.00 in disbursements and assuming this amount is

not in dispute, then I would order total costs to Dexter in the amount of
\$12,681.00.

Boudreau J.