IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Alumitech Architectural Glass & Metal Ltd. v. J.W. Lindsay Enterprises Ltd., 2006 NSSC 14

Date: 20060116
Docket: S.H. 177985
Registry: Halifax

Between:

Alumitech Architectural Glass & Metal Limited

Plaintiff
Defendant by Counter-Claim

v.

J. W. Lindsay Enterprises Limited

Defendant
Plaintiff by Counter-Claim

Judge:	The Honourable Justice A. David MacAdam
Heard:	December 20, 21 and 22, 2005, in Halifax, Nova Scotia
Counsel:	James D. MacNeil and George Ash (articled clerk), for the Plaintiff Geoffrey Saunders and Lindsay Jardine (articled clerk), for the Defendant

MacAdam, J.:

[1] The plaintiff, and defendant by counter-claim, Alumitech Architectural Glass & Metal Ltd., (herein "Alumitech"), is in the business of manufacturing and installing building envelopes. The defendant, and plaintiff by counter-claim, J. W. Lindsay Enterprises Limited, (herein "Lindsay"), is a general contractor whose business includes, in part, the installing of building envelopes.

[2] In 1999, Alumitech was the successful bidder on a call for tenders by Dalhousie University, for the installation of a building envelope on a new Faculty of Arts and Social Sciences, (herein "FASS"), building. Lindsay was one of the unsuccessful bidders and, following the awarding of the contract to Alumitech, contacted them with a view to obtaining at least a part of the work which had been awarded to Alumitech. Darren Mattie, (herein "Mattie"), who was a cladding estimator, employed by Lindsay in the preparation of its tender, testified that in view of the time and effort expended in the preparation of its tender, Lindsay was interested in determining whether Alumitech was prepared to subcontract at least a portion of the work.

[3] Mattie prepared a quote, dated December 23, 1999, which apparently included the portion of the work awarded to Alumitech for the construction of the exterior walls up to the point of installation of the cement board and aluminum flashings. The quote was faxed to Norsat Eblaghi, (herein "Eblaghi"), the owner and principal officer of Alumitech. Before being faxed, the quote was reviewed and confirmed by the late Larry Wilson, (herein "Wilson"), the manager of Lindsay's Cladding Group or Division.

[4] The quote, in part, read:

> Our work includes the two following systems:
>
> On block wall (approximately 18,000 square feet):
>
> l. Supply and install air barrier on block,
>
> 2. Supply and install 4" horizontal "Z" on 24" centers,
>
> 3. Supply and install 4" AF-110 insulation,

4. Supply and install vertical hat sections on “Z’s” at 16" centers.

On stud walls (approximately 21,000 square feet):

1. Supply and install horizontal liner panel on to studs,

2. Supply and install horizontal “Z’s” on liner,

3. Supply and install 4" AF-110 insulation,

4. Supply and install vertical hat sections on “Z’s” at 16" centers.

Our base price for the above work is two hundred fifty-three thousand seven hundred twenty-seven dollars ($253,727.00) plus HST.

[5] Either on December 23, or the following day, Wilson and Mattie met with Eblaghi and Gerry Scallion, (herein “Scallion”). Scallion was the chief estimator for Alumitech and had been involved in the preparation of the original successful tender to Dalhousie University.

[6] The evidence of Eblaghi and Mattie is clear that at the meeting held at the offices of Alumitech, a considerable amount of the discussion related to a disagreement as to the square feet of the wall system required to be installed. As seen from the estimate of December 23, Mattie calculated approximately 18,000 square feet in respect to block walls and approximately 21,000 square feet in respect to stud walls. Eblaghi, on the other hand, maintained the total wall area was not more 31,000 square feet. It appears from the evidence the main area of disagreement related to the estimates of the area of the stud walls.

[7] During the course of the meeting, the parties discussed a revised “base price” of $240,000.00 for carrying out of the work. Eblaghi testified that this was the figure agreed to at the meeting, while Mattie says Wilson and he agreed to take it back to determine whether or not they were prepared to carry out the work for this lower price. He says that subsequently Eblaghi was contacted and advised that Lindsay was prepared to carry out the work for $240,000.00.

[8] Eblaghi testified that on the copy of the December 23 quote he received by fax he wrote the figure of $240,000.00 and the figure of 6.1538 being the cost per square foot if there were 39,000 square feet of wall system to be installed. He says the figure noted on the exhibit is in his handwriting and represented his calculation of the unit or cost per square foot based on the quote from Lindsay. He then calculated that the difference between 39,000 square feet at this unit cost, as compared to his estimate of 31,000 square feet at the same unit cost price at $50,000.00, and this number he also wrote on his copy of the quote received from Lindsay.

[9] Eblaghi says that he prepared a handwritten purchase order, reflecting the agreement by Lindsay to carry out a portion of his contracted work on the construction of the siding wall system on the FASS building. The purchase order, in part, reads:

> Supply & install $ 240,000.00
>
> Approximately 18,000 □’ (On Block Wall)
>
> & 21,000 ± □’ (On Stud Wall)
>
> Wall System All as per Architectural drawings & specification (NO
>
> CHANGE ON ANY MATERIAL)
>
> NEED Shop drawings as soon as possible all as per Section 07460 Page 2
>
> NOTE) Wall System 2 on stud
>
>) Wall System 2A on Block

[10] Eblaghi testified that at the meeting with Wilson and Mattie it was understood the contract with Lindsay would be at a unit price of 6.1538 dollars per square foot, and that in due time there would be a recalculation of the square footage to determine the total value of the contract. He said that in discussions with Wilson, it was agreed the amount of $240,000.000, based on the 39,000 square foot as estimated by Lindsay, would be used, but there would be a

recalculation of the square footage. He says this is the reason why the 21,000 on stud wall appears with the symbol "±".

[11] The reference in the purchase order to "(NO CHANGE ON ANY MATERIAL)" related, he said, to an option that Lindsay provided for doing the job for a smaller sum, apparently using less quality materials and a different installation than called for under the plans and specifications. There was discussion at the meeting on December 23, or the following day, of the option included with the Lindsay quote to do the work for a lesser amount and it was agreed Alumitech would inquire of Dalhousie whether they were interested in the reduced price. He said he was advised the original plans and specifications were to be adhered to and this accounts for the insertion in the purchase order of the phrase "(NO CHANGE ON ANY MATERIAL)".

[12] He said when he faxed the purchase order to Lindsay, he included a portion of the specifications which dealt with shop drawings on the wall system and the requirement to submit shop drawings. Also, he said, with the fax he also included the original Lindsay quote, with his notations of the revised figure of $240,000.00, the 6.1538 square foot and the $50,000.00 difference. The quote from Lindsay consisted of two pages and he said the fax he forwarded to Lindsay contained all four pages. The suggested four page fax containing the purchase order and other documents was apparently sent to the late Mr. Wilson. Mattie, as well as Ernest Porter, (herein "Porter"), the president of Lindsay, testified that in viewing Lindsay's files they could not locate the version of the Lindsay quote that included the written notations by Eblaghi. They said in reviewing the files at Lindsay's, there was no record of Lindsay's having received this version of their original quote.

[13] Mattie testified at the meeting on December 23 or 24, there was discussion of the square footage that was required for the project and disagreement as to the calculation of the square footage involved. He agreed there was discussion of 6.1538 per square foot, but denied that at any time Wilson or he agreed the contract was to be at a unit price. He testified it was always to be lump sum and he said he had no recollection of any understanding or agreement that either he or Wilson would be recalculating the square footage. For whatever work that was required to be carried out, Lindsay was to be paid a lump sum of $240,000.00.

[14] Between March and October 2000, the work contracted for by Alumitech was performed by Lindsay. There is no issue of the workmanship, nor of the completion of the job by Lindsay by the end of October, 2000.

[15] During the course of the contract, Lindsay issued a number of progress claims, the first being for the period March 1 - 31, 2000. The progress claim stipulated as follows:

Original Contract Sum		240,000.00
Additions		-
Sub Total		240,000.00
Deductions		-
Total Contract		240,000.00
Balance to Complete		180,890.00
Total Completed to Date		59,110.00
Material on Site		-
Total		
Complete		59,110.00
Less Retainage at	10%	5,911.00
Total Earned less Retainage		53,199.00
Less Previous Claims		-
Net Claim This Period		53,199.00
Add Harmonized Sales Tax at	15%	7,979.85
Amount Requested for Payment		61,178.85

[16] The remaining progress claims were in the same form, although indicating the amounts completed on the date for the period covered by the claim, and included a deduction of the amounts on the previous claims.

[17] Lindsay maintained that at no time was objection taken by Eblaghi to the reference in the progress claims to the original contract sum as being $240,000.00. All the witnesses testifying on behalf of the defendant, who had knowledge of the contract, indicated their understanding that it was a lump sum contract of $240,000.00, to do the necessary work.

[18] Traditionally, Alumitech acted as sub to Lindsay, and in fact this was the only occasion in which Lindsay was a sub to Alumitech. During this period, there were a number of small jobs performed by Alumitech on behalf of Lindsay, and for which Alumitech was claiming payment. It appears that the controller of Lindsay indicated to Lindsay's management group the outstanding unpaid account of Alumitech on the FASS job. During the course of these discussions, it was suggested that the monies owed to Alumitech on the so-called small jobs be withheld as a method of collecting the amounts outstanding on the FASS project. Porter testified that although this approach was suggested and in fact monies were withheld from payment to Alumitech, it was deemed preferable to try to resolve the outstanding dispute with Eblaghi. As a result, Paul Vincent, (herein "Vincent"), described as Business Development Manager, was directed to discuss with Eblaghi the possible resolution of the dispute relating to the unpaid Lindsay accounts in respect to the FASS project. Porter testified that Vincent reported to the management group meetings, as a member of the group, and advised on his efforts to resolve the dispute with Alumitech.

[19] Although Vincent did not testify at trial, extensive portions of his discovery were tendered by counsel for Alumitech, and supplemented by further of his discovery evidence entered by counsel for Lindsay.

[20] By letter dated October 25, 2000, Eblaghi wrote to Vincent, in respect to one of the accounts of Alumitech which had not been paid by Lindsay. The correspondence reads:

> In an attempt to collect funds owing on a couple of projects, we were informed that you had received the funds for JJ MacKay progress claims dated August.

> The amount owing to Alumitech on this project for August is $16,881.89. Although a cheque has been cut, Anne Driscoll will not release these funds due to money we owe you for the Dalhousie Siding project. Please note, you have been paid for what you have done at this project.
>
> If we cannot pick up our cheque immediately, we will close our account with your company and will not deal with you in the future. We await your response to this.

[21] Vincent testified on discovery that he became involved in the pricing dispute between Lindsay and Alumitech after Mattie left Lindsay's in September, 2000. Obviously, from the letter by Eblaghi dated October 25, 2000, he was involved in the dispute by late October.

[22] Vincent also testified on discovery that prior to Wilson's death in the fall of 2001, he had discussed with Wilson whether the purchase order was "lump sum" or whether it was "unit price", and Wilson said it was "lump sum".

[23] Eblaghi stated that during discussions with Vincent he indicated he would go along with whatever Wilson said as to whether the contract was "lump sum" or "unit price". He testified he had dealt with Wilson over the years and had found him to be an honourable man, and was prepared to abide by Wilson's recollection of the discussions which occurred on December 23 or 24, and following, as to the nature of the contract between Lindsay and Alumitech. In respect to this proposal by Eblaghi, Vincent, in his discovery examination, testified:

> Q. ... But now you had said that at that time you reviewed the file.
>
> A. I started to, yes.
>
> Q. And immediately is what you had testified to, you decided a fixed price contract?
>
> A. Yes, our -- yes, immediately, yes.
>
> Q. Why did Lindsay's contract with Alumitech after this date then if that issue had arose?
>
> A. We -- I think in our conversations with Norsat and that, you know, we were at that stage, still pretty -- based on our long-term relationship, Norsat and I had a couple of conversations. We thought like, you know,

let's put it aside. We'll work it out. We'll do it and we continued to do business. But as time went on we couldn't come over that issue of whether it was unit price or lump sum and, I mean, that's what I -- we just -- we put it aside and tried to forge ahead with business.

Q. And you'll agree that in those conversations it was Norsat's and Alumitech's position, "Talk to Larry and this will be straightened out." Right from back in late 2000. That was their position right from the get go.

A. Yes.

Q. As soon as you got involved, right?

A. At some point, yeah, we realized we had to talk to Larry.

Q. Yeah.

A. And we mutually agreed that I would talk to Larry.

[24] Later, on being further examined on this issue, Vincent responded to counsel:

Q. How long was Larry with Lindsay's?

A. I would have to guess over 30 years.

Q. And he had dealt with Norsat on many occasions or do you know?

A. I don't really know. That would be a better question for Norsat.

Q. Sure. Did you know -- they knew each other, other than this Dal job?

A. Yeah.

Q. You knew that?

A. Yeah.

Q. And in your discussions with Norsat regarding this contract did Norsat ever tell you -- I mean you've agreed with me he said, "Go ask Larry."

A. Um-hmm.

Q. Did he ever say to you, “Tell me what Larry said” or was that necessary?

A. I don’t -- he never -- I don’t remember him ever asking me that.

Q. But you remember him saying, “Just find out from Larry?”

A. My recollection of the conversation was that we -- I thought that we mutually agreed that I should talk to Larry. He would be the guy that ultimately resolved this.

Q. And you’ve never said to Norsat, “I talked to Larry. He said this?”

A. No.

Q. Why not, when you just said you knew that’s all Norsat needed to know?

A. I -- when I wrote the letter I assumed that that covered that issue off. That he would have known that, in my mind, making a statement as for the company that that would have said -- informed him of that.

Q. And that’s your testimony today after telling me you had months of conversations with Norsat where it was raised many times, “Talk to Larry.” You thought that July 17th letter would cover it?

A. Yes.

[25] The relevant portion of the letter referred to by Vincent reads as follows:

> As agreed in our meeting of Monday July 16, 2001 to respond by today, we have reviewed your claim with all our staff that were involved in the above contract. It was concluded that there was never any intent for this to be a unit price contract which is substantiated by your lump sum purchase order dated June 26, 2000 issued to us for $240,000.00.

[26] Eblaghi testified he did not regard this as confirmation Wilson had said the contract was lump sum, rather than unit price. He testified he was never informed Vincent or anyone else had spoken to Wilson as to the nature of the contract, or that Wilson had at any time indicated that it was lump sum, as opposed to unit

price. He testified he attempted to himself contact Wilson, leaving messages at Lindsay, but was never informed Wilson had by this time retired and was no longer working at Lindsay.

[27] Porter testified that Wilson retired in the summer of 2000, but would visit the company occasionally. Also, since he had an ownership position in the company, he attended the Annual Meeting of Shareholders. At discovery, Vincent testified Wilson retired June 30, 2000. Eblaghi testified that on one occasion he was told Wilson was on vacation and, in fact, Vincent, in his examination, acknowledged in the affirmative when he was asked whether he recalled telling Eblaghi that Wilson was not available as he was on vacation. In fact, on the evidence, it appears during the period of time Vincent was involved in attempting to resolve the issue of the contract with Eblaghi, Wilson had already retired.

[28] Counsel for Alumitech suggest it is open for the Court to find that notwithstanding the discovery evidence of Vincent, Wilson had obviously confirmed it was a unit price contract and the Court should so find. Clearly there are concerns raised by the evidence of Vincent, which clearly seems to acknowledge the evidence of Eblaghi that he offered to resolve this matter on the basis of the recollection of Wilson. I am satisfied Eblaghi was never told that Vincent had met or spoken to Wilson. However, despite some sympathy for the argument raised by counsel for Alumitech, I am not satisfied that on the evidence it is open to find that Vincent misled Eblaghi by not informing him that Wilson had agreed with Alumitech's interpretation as to the nature of the contract. I am nevertheless satisfied that Vincent acknowledges speaking to Wilson and yet failed to clearly, in writing or orally, communicate to Eblaghi the position of Wilson *vis-à-vis* the nature of the contract. This is perhaps understandable if, as counsel for Alumitech suggests, Wilson had confirmed Eblaghi's interpretation that it was a unit price contract. Clearly Lindsay had the opportunity to conclude this dispute by communicating to Eblaghi the position of Wilson or having Wilson, as Eblaghi expected, communicate to himself his recollection as to the nature of the contract.

[29] Having regard to the evidence, I am satisfied Alumitech viewed this contract as unit price and Eblaghi anticipated that during the performance, or shortly thereafter, of the contract, there would be a recalculation of the square footage of the walls which Eblaghi believed would confirm his estimate that the work did not involve more than 31,000 square feet.

[30] I am also satisfied that Mattie, in carrying out his estimate, calculated the square footage, on the basis of the components of the work to be done, at approximately 39,000 square feet. I accept Mattie's explanation that in calculating his estimates he looked at each component of the job and determined what was involved with each component. In respect to certain of the wall area to be covered it would have been necessary to purchase materials for the whole of the wall area knowing portions, such as windows, would have to be cut out. He was not challenged on his evidence that in effect these cutout portions would be "wasted", but nevertheless were required to be included in the calculation of the quantity of materials required for each component of the wall system.

[31] In asserting the evidence substantiated a lump sum of $240,000.00, Lindsay refers to a change of contract credit issued by Alumitech and directed to Lindsay. The document authored by Eblaghi and dated May 3, 2000, reads as follows:

> As Per my Conversation with you on site April 12 Please provide Credit to delete 600 sq. ft. at 8 roof Traces (sic).

[32] With reference to $8.00 per square foot, Eblaghi testified the area being deleted was complicated and one of the more difficult areas and, therefore, the average unit price of $6.1538 would not be applicable. Dalhousie University, he said, had sophisticated builders who would be aware that this was one of the more difficult and complicated areas of work which was being deleted. He says the credit note was sent to Lindsay for their input in view of the circumstances. Attached to the fax sent were additional details on the areas of work being deleted. Lindsay, on the other hand, says that if this was a lump sum contract, there would have been no need for a credit note for work being deleted, since that simply would not be part of the unit work performed by them.

[33] On the evidence, it appears that Lindsay never responded. I am nevertheless satisfied with the explanation by Eblaghi as to why, even in the circumstance of a unit price contract, he felt it necessary, or at least appropriate, to communicate with Lindsay as to a figure to be given to Dalhousie for the deletion of this work.

[34] **Issues:**

1. Was there a unit price or fixed price contract between Alumitech and Lindsay in respect to the FASS project?

2. If there was no unit price or fixed price contract, what is the value of the contract in the circumstances?

Was the Contract for Unit or Lump Sum Price?

[35] Having reviewed the evidence, including documentary evidence, I am satisfied there was no consensus or meeting of the minds as between Eblaghi, on behalf of Alumitech, and Wilson, on behalf of Lindsay. Clearly Eblaghi believed, and continues to believe, he had negotiated a unit price contract with Wilson notwithstanding the form of the purchase order he issued which, on its face, suggested a lump sum contract, although also containing an estimate of the square footage of work to be completed by Lindsay. I am satisfied, having heard and considered the evidence of Eblaghi that he viewed the figures as representing the cost for the square footage being advanced by Lindsay. He understood, from his discussions with Wilson, Lindsay would be conducting a recalculation of the square footage which , he believed, would result in a corresponding downward adjustment to the price for the work.

[36] On the other hand, having heard the evidence of Mattie, I am satisfied that from his perspective the disagreement on square footage related to the calculation methodology adopted, on the one hand by Eblaghi, and on the other hand by himself, on behalf of Lindsay. It appears Eblaghi estimated the actual square footage of siding that was to be installed while the effect of the component calculations by Mattie was to calculate the amount of siding that would be required in order to complete the installation. This amount of siding would have to take into account the substantial areas to be cut out as part of the installation work. Nevertheless the quantity of materials to be purchased would have included these portions to be cut out. The documents and materials received by Lindsay, in the absence of Wilson, and whether or not they included the copy of the original quote by Lindsay on which Eblaghi had noted his figures, even though relating to his calculation of square footage, suggest a lump sum of $240,000.00 for an estimated area of 39,000 square feet.

[37] In assessing the evidence of Eblaghi, I have taken into account he offered to Vincent to accept the recollection of Wilson as to whether the contract was unit price or lump sum. I am further satisfied that Vincent did speak to Wilson, before he died, concerning the nature of the contract and that the only communication to Eblaghi, concerning this, was the less than clear communication, apparently

forwarded in July, 2001 to the effect that "... we have reviewed your claim with all our staff that were involved in the above contract. It was concluded that there was never any intent for this to be a unit price contract which is substantiated by your lump sum purchase order dated June 26, 2000 issued to us for $240,000.00."

[38] The suggestion this letter is to be interpreted as including Wilson as having stated the contract was a lump sum contract is simply not credible. In the circumstances and having regard to the acknowledgment by Vincent, in the excerpts from discovery evidence tendered at trial, that Eblaghi had agreed to accept the nature of the contract recollected by Wilson called for a specific statement as to what Wilson was alleged to have said or, more likely, some form of communication from Wilson to Eblaghi as to his recollection. The vague reference in this correspondence to having contacted "all our staff that were involved in the above contract" is simply just not good enough. Eblaghi was entitled to something more having made the proposal to accept what Wilson said about the nature of the contract.

[39] During submission, counsel for Alumitech indicated his position was that the parties were not "*ad idem"* on whether it was unit price or lump sum. With counsel's position I am in agreement.

QUANTUM MERIT

[40] Both counsel in their pre-hearing submissions referenced the decision of the Ontario District Court in *Bruce Baird Construction Ltd. v. Guigues*, [1988] O.J. No. 2848. An action was brought for the balance owing on a contract to build a home. Following construction of the home, a dispute arose as to the terms of the contract. The plaintiff claimed the contract was cost-plus; one of the defendants claimed a fixed price. The Court found the parties were not "*ad idem*" as to the terms of the contract, although there was an agreement between the parties for work to be done at the request of and for the benefit of the defendant. The plaintiff was held to be entitled to recover on a *quantum meruit* basis, and at paras. 49-53 Soublière, D.C.J. noted:

> As I say, I find that the parties were not ad idem and that there was no fixed contract, the terms of which were each in their own minds the same.

Consequently, I have to now turn myself to what the court ought to do under these circumstances. In this regard I am assisted by the cases that were given to me by counsel for the defendant, more particularly Stevens & Fiske Construction Ltd. v. Johnson (1973), 9 N.S.R. (2d) 608.

At pp. 618-619 of the Stevens & Fiske decision, para. 22, I read as follows:

> "The doctrine of quantum meruit, by virtue of which the courts will hold a person liable in certain circumstances to pay a reasonable remuneration for work performed for his benefit, is based on the theory of implied contract, or quasi-contract. This means that, although no actual agreement has been made between the parties the law will imply a promise to pay a reasonable amount, if the circumstances bringing the doctrine into play exist. It follows from the fact that payment on a quantum meruit basis can arise only as a result of an implied contract, that the doctrine can have no application whatever in circumstances where a contract exists covering payment for the particular work in question."

I find that that is the case here, that indeed there was no contract between the parties. Nonetheless, the work was done and it was done at the request and for the benefit of the defendants. I continue my reading:

> "A contractor will, therefore, be able to recover payment on a quantum meruit basis only if either he has performed work for an owner in respect of where there never was an agreement with regard to payment, or if work has been performed in pursuance of a contract which has been abandoned by the owner, or changed so fundamentally that the payment provisions of the contract no longer have any application to the work actually performed.
>
> ...
>
> In order to render a person liable to pay on a quantum meruit basis, the work must either be done at his request, express or implied, or he must accept the benefit of the work."

In this case both of those conditions are met. I continue at p. 619:

> "Once it has been established that a contractor is entitled to be recompensed on a quantum meruit basis, it is up to him to establish, by proper evidence what a reasonable remuneration for the work done would be in the particular case. If there was originally a contract that has been

> abandoned, the price for which the contractor was willing to perform that, or similar, work may be some evidence of what would be reasonable, as would also expert evidence of other contractors in the field. All the circumstances surrounding the situation under which the obligation arose are relevant to be considered. A cost plus basis may be, but is not necessarily, a proper basis for determining a reasonable remuneration as the proper measure is the value of the work to the owner and not the cost to the contractor."
>
> I think that that particular principle applies in the circumstances of this case as well.

[41] I am similarly satisfied that in the present circumstances, the doctrine of *quantum meruit* is applicable. The defendant, at the request of the plaintiff, performed work on which I am satisfied there was no meeting of the minds as to the price or compensation to be paid to the defendant. To be determined, therefore, is the value to be assigned to the work performed by the defendant, which is acknowledged by the plaintiff as having been fully performed in a competent manner. Soublière, D.C.J., on the burden of proof, refers to the statement by Justice Gillis in *Stevens & Fiske Construction Ltd. v. Johnson*, (1973), 9 N.S.R. (2D) 608, at para. 16:

> ... The defendant insists but does not prove, in my finding, that the charges were unreasonable and excessive. Of course there is no burden on the defendant on this. Rather the burden of proof of reasonableness is upon the plaintiff, but I have no measure of the reasonableness except what has been set up by the plaintiff in the evidence. There is evidence of reasonableness there which is not offset by the defendant. ...

[42] On the difficult question of determining what would be a reasonable remuneration, the Nova Scotia Supreme Court, Appeal Division, in *Ivan B. Crouse & Son Ltd. v. Cameron,* [1974] N.S.J. No. 168; 6 N.S.R. (2d) 590 at para. 29 observed:

> This brings me to the extremely difficult issue of determining what is reasonable compensation in this particular case. As stated in the last preceding quote from Hudson's Building and Engineering Contracts and that from Keating, Law and Practice of Building Contracts, the court may:
>
> "(1) Act upon evidence calculated upon the cost of labour, plant and materials, plus a reasonable percentage for profit, or

> (2) Act upon evidence of what reasonable rates for the work involved would be.
>
> (3) Consider abortive negotiations as to price.
>
> (4) Consider the opinion of experienced builders or other experts as to a reasonable sum."

[43] Alumitech suggest that reasonable remuneration would be the cost per square foot calculated by Eblaghi, namely $6.1538 per square foot but based on 31,000 square feet. Counsel further submits that the resulting calculation of the amount due to Lindsay has already been paid and, therefore, no monies are owing to Lindsay on the FASS project.

[44] On the other hand, counsel for Lindsay notes that introduced into evidence were the Lindsay job cost ledger and purchase order journal with respect to this project, and that the total costs, as appears from these exhibits, is $116,631.78 for labour, $118,280.65 for materials and a miscellaneous charge of $751.82, for a total of $235,664.25. There is a further miscellaneous figure of $55.76 resulting in a total cost of $235,720.01. Counsel suggest that even allowing for a two percent profit margin, notwithstanding the evidence tendered, that in this type of contract a reasonable profit margin would be fifteen percent, a reasonable remuneration to Lindsay would be $240,000.00. The effect is that Lindsay would receive compensation as if the contract had been a lump sum contract for $240,000.00.

[45] With Lindsay's position, I obviously have some difficulty. However, the evidence as to the costs incurred by Lindsay was not seriously challenged by counsel for Alumitech, who merely suggested during oral submission that there may have been cost overruns, work inefficiencies or mis-budgeting. Counsel suggested there is no evidence that the unit price of $6.1538 was not a reasonable figure and suggested the burden is on Lindsay to prove that its costs were reasonable.

[46] As was the case in *Stevens & Fiske Construction Ltd. v. Johnson, supra,* there is no evidence to offset the suggested costs incurred by Lindsay for the work. Having regard to the four alternatives for calculating a reasonable remuneration, there is no evidence of what would be reasonable rates for the work involved, no

evidence of aborted negotiations as to price that would assist is suggesting a reasonable remuneration nor expert evidence of experienced builders or other experts as to what would be a reasonable sum. The only evidence tendered, and on which I can act, is the evidence of the costs for labour and material incurred by Lindsay in performing the project.

[47] Counsel for Alumitech noted that in *Bruce Baird Construction Ltd. v. Guigues*, *supra,* Soublière, D.C.J. at para. 59 observed that if the Court granted judgment based on the evidence of costs, plus a reasonable percentage for profit, it would, in effect, be finding the contract as set out in the terms being advanced by the plaintiff. Soubliére, D.C.J. then continued:

> ... I have already rejected that as being factually incorrect and that that was not the agreement between the parties, although it may have been so in the mind of the plaintiff.

[48] The Court indicated that rather then following this course, it preferred to adopt the fourth alternative and to consider the opinion of the two experts who gave evidence during the course of the trial. However, as noted, there were no such experts in the present circumstance and the only evidence was that relative to alternative number one, namely, the cost to do the work.

[49] In respect to the FASS project, Lindsay shall have judgment based on a contract price of $240,000.00, from which shall be deducted the amounts paid and any offset arising from the small contracts performed by Alumitech for Lindsay and on which payment has not been made to date.

COSTS

[50] I am satisfied that following completion of the work, Eblaghi communicated to Vincent that he was prepared to resolve the dispute concerning the nature of the contract on the basis of the recollection of Wilson. I am satisfied, based on the discovery examination tendered in court, that Vincent did communicate with Wilson, and I am further satisfied there was no adequate communication to Eblaghi of the position taken by Wilson. Counsel for Alumitech takes the position that Wilson's opinion was obviously adverse to the position of Lindsay. I have decided not to draw such a conclusion; however, in respect to the matter of costs I am sufficiently satisfied that this litigation was unnecessary. If Lindsay, through

Vincent, or for that matter Wilson himself, at the direction of Vincent, had communicated to Eblaghi on Wilson's position as to the terms of the contract, this proceeding, including this trial, would have been unnecessary. Clearly, Lindsay would have been bound if Wilson recollected the contract as being a unit price contract. Also, on the evidence, I am satisfied Eblaghi would have accepted Wilson's recollection if it was to the effect the contract was a lump sum for $240,000.00. There will be no costs to Lindsay as a consequence.

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MacAdam, J.