SUPREME COURT OF NOVA SCOTIA

Citation: Dexter Construction Company Ltd. v. Nova Scotia (Attorney General), 2011 NSSC 92

Date: 20110304
Docket: Hfx. No. 285919
Registry: Halifax

Between:

Dexter Construction Company Limited

Plaintiff

v.

The Attorney General of Nova Scotia

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	December 22, 2010, in Halifax, Nova Scotia
Oral Decision:	February 18, 2011
Written Decision:	March 4, 2011
Counsel:	Michael Pugsley and Ryan Brothers, for the plaintiff Michelle Awad, Q.C. and Michael Blades, Articling Clerk, for the defendant

By the Court:

[1] This is an application by the defendant pursuant to *Civil Procedure Rule* 14.12 for the disclosure of bid notes, take off sheets, estimates and related documents in the possession of the plaintiff.

Background

[2] The plaintiff entered into four individual contracts with the defendant in relation to highway paving projects in Nova Scotia. Each contract required the plaintiff to supply and place Performance Graded Asphalt Binder (PGAB) in the course of the completion of the contracts. Each contract contained a provision providing for an increase in the contract price if the price of the PGAB increased between the date the contracts were executed and the date the PGAB was placed. The following provisions deal with the issue:

> **Section 2 – PERFORMANCE GRADED ASPHALT BINDER (PGAB)**
>
> ...

3.3 Contracts carried over to the next calendar year.

In the event the suppliers posted rack increases or decreases subsequent to the end of the calendar year in which the asphalt work was initially scheduled and one of the following conditions is satisfied, then a price increase or decrease will be considered:

...

- In the opinion of the department, the lateness in tender call, makes it unreasonable for the contractor to finish asphalt work that year. This will be noted in the special provisions of the contract; or

- in the opinion of the Department, for reasons (s) beyond the control of the contractor, the work could not be completed before the end of the calendar year in which the work was initially intended to be completed.

If the request for price increase or decrease is approved by the District Director the Contractor will be assessed an increase or decrease for an amount equal to the actual dollar difference between the Supplier's original Posted Rack Price quotation and the Supplier's new Posted Rack Price for PGAB. In all cases the Supplier's Posted Rack Price quotation for the price of PGAB for the next calendar year shall be submitted to the Engineer before the Contractor will be paid for any PGAB used that year. Any claim for a price difference by the contractor shall be supported by the Supplier's invoice.

...

SECTION 19 - ASPHALT CONCRETE END PRODUCT SPECIFICATION (EPS)

> 4.1 Performance Graded Asphalt Binder (PGAB). PGAB shall be supplied by the Contractor in accordance with the Standard Specification Division 4, Section 2. Specific PGAB grade requirements will be denoted in the contract specifications.

[3] Due to the lateness of the execution of the contracts, each project was completed in 2006, which resulted in the plaintiff allegedly paying a higher price for the PGAB. The plaintiff requested payment reflecting the increase in the price of the PGAB. The defendant refused such payment, denying that the plaintiff was entitled to any additional compensation. The plaintiff commenced proceeding seeking special damages for losses they claim they suffered due to the defendant's failure to assess and compensate them in accordance with the terms of the contracts.

[4] The defendant, in its Statement of Defence, denies the plaintiff is entitled to any additional compensation, claiming it was not under a contractual obligation to pay the plaintiff for an increase in the price of PGAB, and, alternatively, the defendant claims that any PGAB increase was considered and rejected.

Basis For The Application

[5] The underpinning for the defendant's motion is that in bidding the tenders the plaintiffs incorporated certain risk management mechanisms, and in doing so, the plaintiff planned for a PGAB price increase. The effect of including the price increase in its bid, it is alleged, would result in the plaintiff receiving double compensation.

[6] At the discovery of an official of the plaintiff, counsel for the defendant sought the production of estimates and bid files for the four contracts in question to determine if the plaintiff prepared the bids to account for the possibility of fluctuation of PGAB prices. There is no dispute that such documents exist and are in the plaintiff's possession. The defendant claims that they are relevant or have a semblance of relevance.

[7] Stanley Bruce Fitzner, an official with the Department of Transportation and Infrastructure Renewal, testified at discovery that the contracts in question were awarded to the plaintiff because they were the low bidder and that there were no compliance issues. Ms. Awad, on behalf of the plaintiff, submitted on the hearing of the motion that the contracts in question were fixed-price contracts, subject only to the variation for the PGAB.

[8] The plaintiff asserts that the documents requested by the defendant are not relevant because the only variation allowed to fixed-price contracts were the increases in the price of the PGAB in accordance with the terms of the contract provisions.

[9] The relevant provisions of the *Civil Procedure Rules* are as follows:

> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.
>
> Rule 14 - Disclosure and Discovery in General
>
> Meaning of “relevant” in Part 5
>
> 14.01 (1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> > (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.
>
> ...
>
> Order for production
>
> 14.12 (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

[10] The burden or onus of demonstrating the relevance of a document is on a party seeking its production. See *Crosby v. Fisher*, [2002] N.S.J. No. 121

[11] Under the 1972 *Civil Procedure Rules*, the basis upon which documents were ordered produced was on a standard of semblance of relevance: See *Dowling v. Securicor Canada Limited* 2003 NSCA 69, paras. 9 - 12.

[12] Since the coming into effect of the 2009 *Civil Procedure Rules*, Rule 14.01 requires the Chambers Judge to determine the relevance of the document by

considering if the trial judge would determine the document(s) relevant before making a finding of relevancy and ordering its production.

[13] The current disclosure Rules require each party to produce all relevant documents, and Rule 14.08 provides for a presumption for full disclosure. It is apparent that the test for the production of documents is now more restrictive than what was previously required under the 1972 *Civil Procedure Rules*.

[14] Therefore, the standard of production of documents on a standard of semblance of relevancy is abolished. - See *Saturley v. CIBC World Market* [2011] N.S.J. No. 8*; Murphy v. Lawton's Drug Stores Ltd.* [2010] N.S.J. No. 409 and *Halifax Dartmouth Bridge Commission v. Walter Construction Corp.* [2009] N.S.J. No. 640.

[15] Although this is an application under Rule 14.12, the defendant relies on the following passage of *Halifax Dartmouth Bridge Commission*, supra, for the proposition that the standard of relevancy should apply at the discovery stage of the proceedings. In that case, the issue was whether documents in the hands of the plaintiff possibly disclosing whether the Angus L. MacDonald Bridge was subject

to movement and whether such movement had caused the failure of the replacement road surface material. The defendant relies on para. 16:

> 16 I am of the view that the object of the rule is to make available information and documents that are likely to lead to relevant evidence at trial, which I take to mean that the information will probably lead to relevant evidence at trial. The key feature of the current rule is that the evidence has to be relevant to an issue at trial. It is important, however, to be mindful that at the pre-trial stage, the parties are still investigating the claim to determine whether there is a basis to defend. Consequently, at discovery, witnesses can be examined both as to relevant evidence and also for information that is likely to lead to relevant evidence. Similarly, witnesses could be examined on documents that are relevant and also on documents that are likely to lead to relevant evidence.

[16] It is important, however, that to read para. 16 in the context of para. 15, where I stated that the rule provides that relevancy is to be determined on the threshold of relevancy at trial. I also added that the parties have to "search for, acquire and disclose relevant documents". It is also important to consider that *Halifax Dartmouth Bridge Commission* was largely argued under Rule 18.13, not Rules 14 or 15. Nevertheless, I believe that *Saturley* clearly sets out the principles of disclosure under Rule 14 or Rule 18. Moir, J., stated at para. 9, that the "new" definition of relevant "... Fundamentally alters the approach to be taken by counsel and the Court when a question about relevancy arises in the disclosure of documents or the discovery of witnesses" and that the Chambers Judge must make his or her determination based on the trial relevancy of the information.

Nonetheless, Moir, J. noted at para. 47 that Rule 14 did not mean a retreat from the broad or liberal approach to disclosure or the discovery of witnesses. However, as noted in *Murphy*, supra, and *Saturley*, supra, the Rule clearly provides for a less expansive scope of what is meant to be relevant.

[17] In *Murphy*, supra, the question was whether the plaintiff was entitled to obtain log sheets for two years prior to an alleged fall, including the log sheets for months following the alleged fall in the defendant's premises. I ordered production of an additional one month of log sheet and one additional monthly report previous to the date of the fall as I deemed these to be relevant to an issue at trial, namely whether there was a system in place, but I declined to order any documents for the period of following the fall because such documents were not relevant to an issue raised by the pleadings or by subsequent evidence. Although I did not address this point specifically in *Murphy*, supra, it is important to note that relevance in the civil context is determined by the pleadings or by evidence available at the time of the hearing of the motion for disclosure. In fact, Moir, J. at para. 45, writes:

> 45 As I read Rule 14.01(1), counsel who are deciding whether to make an issue about the relevancy of something for disclosure, or at discovery, must do their

> best to put themselves at the vantage they will have at the beginning of the trial. And, when the issue goes to chambers, counsel will have to do their best to give the chambers judge the vantage the trial judge would have at the beginning of the trial. And, the chambers judge must make a ruling from that vantage, imperfectly constructed though it may be.

[18] The pleadings in this proceeding are narrow in scope. The plaintiff alleges that the defendant breached the contract by failing to follow the terms of the Specifications. On the other hand, the defendant denies that there was any contractual obligation owed to the plaintiff to raise the price of PGAB and says that consequently there was no breach of contract. The defendant did not allege in its pleadings that there was issue with the overall bids on any of the four contracts or that the bids were non-compliant, which would have required the Department to review the details of the bid procedures. In fact, according to Mr. Fitzner, if the bids had been non-compliant, the Department would have followed its policy and rejected them.

[19] The defendant relies on *White Pine Electric v. Comact Inc.* [2006] O.J. No. 477, as a basis for the Court ordering the production of the take-off documents and any documents relating to the preparation of the plaintiff's bid. In that decision, the Court stated at para. 14:

> 14 In reviewing the pleadings I note that in the Statement of Defence and counterclaim the Defendants have clearly placed in issue what the Plaintiff knew or ought to have know was to be included in its bid. The issue that is raised by the Defendants is in essence that the Plaintiff should not be permitted to claim as an extra something which was included in its pricing for its bid. I am satisfied that there is a semblance of relevance to the take off documents such that the Plaintiff should not be entitled to refuse to provide them.

[20] The plaintiff asserts that the Court should not follow *White Pine*, supra, because the Chambers Judge applied the standard of "semblance of relevance" and secondly, the contract price expressly included an amount for "extras". Furthermore, the plaintiff had claimed for extra expenses incurred relating to cables, terminations and various other pieces of equipment and the defendant was rejecting the claim arguing that the plaintiff knew that the extras claim might be required. Therefore, the takeout sheets bore a "semblance of relevance" because the pleadings specifically put in issue the plaintiff's objective considerations when bidding and the contract itself evidenced that the plaintiff had inflated its contract price based on certain "extra" expenses.

[21] The defendant also relies on the case of *Englelake Limited v. Simons* [2007] O.J. No. 3160. The parties had entered into an agreement whereby Englelake had agreed to supply services, labour and materials to Simons for the construction of a home, for which Simons refused to pay. Englelake sued for non-payment and

Simons claimed that the builder had failed to complete the construction of the home, and counterclaimed for damages for deficiencies and expenses incurred by the plaintiff for completing the home. In an application for an Order to compel an official of the plaintiff to answer certain questions, the Court ordered the questions be answered because they were relevant to the plaintiff's claim for compensation on a *quantum meruit* basis. The Chambers Judge characterized the questions as relating to the plaintiff's calculations of take-off prior to its initial bid submitted to the defendant. The plaintiff took the position that it was a fixed price contract, the Court ruled there were a number of additions and deletions to and from the contract. Also, the plaintiff was making a claim based on *quantum meruit* and not simply based on the alleged fixed-price contract. The plaintiff contends that I should not follow *Englelake*, as the factual matrix of that decision is completely different than the matter before me, where there is no claim in *quantum meriut.*

[22] Unlike *White Pine*, supra, and *Englelake*, supra, the plaintiff argues that the contracts in question were fixed price contracts. Therefore, what factors the plaintiff used as a basis to bid the contracts is not relevant because the plaintiff's bids were successful because they were the lowest. The plaintiff asserts that the issue the trial judge will have to determine is whether the specifications allow the

plaintiff to secure an adjustment for the price increases for the PGAB. Therefore, the factors considered in *White Pine* and *Englelake* are missing here.

[23] The plaintiff refers to the text Waddams, *The Law of Contracts* at p. 105:

> The principal function of the law of contracts is to protect reasonable expectations engendered by promises.… But the test whether promises made, or whether assent is manifested to a bargain, does not and should not depend on enquiry into the actual state of mind of the promisor, on how the promisor's conduct would strike a reasonable person in the position of the promisee.

[24] In addition, the plaintiff refers to a decision of the House of Lords in *London County Council v. Henry Boot & Sons* [1959] 1 W.L.R. 1069, [1959] 3 All E.R. 636, where Lord Denning stated at p. 8:

> I may add, perhaps, a word on the correspondence which took place before the contract was executed. The appellants there made it clear that they did not regard holiday credits as coming within the rise-and-fall clause; but the Builders Association took a different view. Neither side inserted any words in the contract so as to clear up the differences between them. They left the rise-and-fall clause as it was. It was suggested that, on this account, there was no consensus ad idem; your Lordships rejected this suggestion without wishing to hear further arguments on it. There was, to all outward appearances, agreement by the parties on the one thing that really mattered - on the terms that should bind them. In case of differences as to the meaning of those terms, it was for the court to determine it. It does not matter what the parties, in their innermost most state of mind, thought the terms meant. They may each have meant different things. But still the contract is binding according to its terms - as interpreted by the court.

[25] The plaintiff maintains that the matter before the Court does not involve any element regarding the bid pricing in the tenders for the various projects or what the plaintiffs objective consideration at the time of the preparing of the bids. The defendant did not put in issue the plaintiff's bid procedure and therefore the factual basis therefore is quite unlike the circumstances addressed in *White Pine,* supra, and *Englelake*, supra.

[26] I am of the view that the issue before the trial judge will be the correct interpretation of the specifications of the contract. The trial judge will have to consider the various factors which the defendant is entitled to consider when faced with a PGAB price increase request. What is important to consider is the tender dates and the completion dates of the contracts to determine whether there is a basis to resort to clause 3.3 of s. 2 of the Specifications. There are not terms in the contract, nor is there anything in the pleadings or additional evidence, to establish that the plaintiff needs to prove that at the time it was preparing its tender documents it did or did not contemplate the possibility of price increases of the PGAB.

[27] The Specification provided that the plaintiff, as bidder, was required to attach the written price quotation from the Supplier (*of the PGAB*), which prices would be effective at the time of the award of the contract and would remain in effect until the end of the current calendar year (the year of tender) and the bid documents made it clear that no tender would be considered unless it included the price quotation. Consequently, this is a case of contract interpretation and does not involve the individual prices used by the plaintiff to tender on the projects.

[28] As a result, the application is dismissed. The parties are requested to submit on costs within the next three weeks, unless they reach agreement in the meantime.

J.