

SUPREME COURT OF NOVA SCOTIA

Citation: Lunenburg (Town) v. M. Crouse & Sons Construction Ltd.,
2010 NSSC 301

Date: 20100728

Docket: Hfx No. 257882

Registry: Halifax

Between:

Town of Lunenburg

Plaintiff

v.

M. Crouse & Sons Construction Limited

Defendant

v.

The Portage La Prairie Insurance Company and Better Service Insurance Ltd.

Third Parties

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: June 7, 8, 2010, in Liverpool, Nova Scotia

Written Decision: July 28, 2010

Counsel: Wayne F. Francis, for the plaintiff
Rubin Dexter, for the defendant

By the Court:

[1] On August 2, 2003 the roof of the Lunenburg Community Centre leaked extensively during a rainfall. The building sustained significant damage. This action is by the Town to recover the costs to repair the damage and to compensate it for its losses resulting from its inability to use the building during the two month remediation period. The Town claims against M. Crouse & Sons Construction Limited for breach of contract and negligence.

[2] Crouse & Sons contracted with the Town to repair a portion of the roof of the Lunenburg Community Centre. They commenced work on July 21, 2003, began to strip off the tar covering and discovered that the underlying board was wet. They brought this to the attention of the Town. Shortly thereafter they were told not to do any further work until the Town could inspect the roof and obtain estimates. Crouse & Sons stopped further work. The loss occurred on August 2, 2003 after a heavy rain. Crouse & Sons say the Town was the author of its own misfortune by preventing them from completing the job for which they contracted.

[3] The Town is a municipal corporation and the owner of the Lunenburg Community Centre. Crouse & Sons, a locally owned construction company, were hired to replace a six foot by approximately 144 foot strip along one edge of the community centre's flat tar and gravel roof. Robin Scott testified on behalf of the Town. He was the Recreation Director for the Town since 1991. He reports to the Lunenburg War Memorial Community Centre Committee who, in turn, report to Town council. As part of his mandate he manages the recreation facilities owned by the Town, including the community centre.

[4] Mr. Scott described the general condition of the community centre building in 2003 as being fairly good with some issues as to leaks. In 2000 to 2001 he noticed some staining in the ceiling near the outside wall nearest the parking lot. Water started to appear about a year after that. When leaking and puddling of water were noticed, the Town called Crouse & Sons to look at the roof. Mr. Scott made the call. In testimony Mr. Scott indicated that he phoned other companies but, Crouse & Sons were the only company to respond. According to Mr. Scott, companies were not interested in becoming involved because the community centre has a flat roof.

[5] Wade Joudrey and his wife are the owners of Crouse & Sons. Mr. Joudrey met with Mr. Scott to examine the roof of the community centre. After discussion, it was decided that a six foot portion of the roof from the edge of the building and along the whole length of the building would be removed and resurfaced.

[6] Crouse & Sons prepared an estimate dated December 7, 2001(Exhibit 1, Tab 6), which was forwarded to Mr. Scott. The amount of the estimate was \$2,400 plus HST. It covered the following repair to the upper roof:

- a) strip the tar and gravel from the six foot wide leading edge of the upper roof;
- b) replace the said tar and gravel with an MF95 SBS base sheet and top with a No. 250 cap sheet; and
- c) clean up and dispose of all material.

[7] A revised estimate dated August 16, 2002 was prepared by Crouse & Sons to reflect increased costs. The estimate was approved by Mr. Scott in the amount of \$2,880 plus HST, for a total amount of \$3,312.

[8] Crouse & Sons commenced work on July 21, 2003. Their crew commenced removing part of the roof membrane from the designated area, but in doing so discovered wet fibreboard underneath. Accordingly, the crew stopped further work in order to allow the fibreboard to dry. On the following morning, July 22, 2003 the crew removed the tar and gravel over the remainder of the six foot leading edge of the upper roof. At that time Mr. Joudrey advised the Town that the roof boards were too wet to install the roofing material. The fibreboard along the leading edge of the upper roof was not drying, and it appeared to be acting like a sponge and leaking moisture from other areas under the surface of the upper roof. Mr. Joudrey informed Mr. Scott that because of this water/moisture the problems with the upper roof could be more extensive than originally contemplated by the Town and that the entire roof might have to be replaced. As a result, Mr. Scott contacted Peter Haughn, the Deputy Town Manager/Clerk and relayed what he had been told by Mr. Joudrey. Mr. Scott said he was instructed to contact the building inspector and the Town engineer so that they could inspect the roof. Mr. Scott confirmed that he told Mr. Joudrey not to do any further work on the roof so that the Town could make a decision what to do with the roof. As part of the decision-making process

that Mr. Haughn suggested, Mr. Scott arranged for the Town's building inspector, Arnold Rafuse, and the Town engineer, Marc Belliveau, to inspect the roof.

[9] In the meantime, Crouse & Sons purchased 2x4 lumber and 6ml vapour barrier to cover the exposed section of the roof. They stapled the vapour barrier to the 2 x 4's and plastic tarps were put over this. Mr. Joudrey testified that the purpose of this placement was to provide some temporary protection, but mainly to try to dry out the wet fibreboard on the roof.

[10] The roofing materials which Crouse & Sons had previously placed on the upper roof, such as rolls of rubber base sheet and buckets of cold process adhesive, were used on the edges of the tarps to secure them in place.

[11] On July 24, 2003 Arnold Rafuse, Marc Belliveau and Robin Scott examined the upper roof of the building to determine whether additional repair work was required.

[12] Marc Belliveau is a professional engineer. As he inspected the roof, along with Mr. Scott and Mr. Rafuse, one or two tarps were moved back three or four feet from the edge of the upper roof so that they could examine the condition of the upper roof underneath the tarp. One or more of these individuals then readjusted and resecured the tarps.

[13] The Town officials decided that based on its overall condition, the entire roof of the building should be replaced. Mr. Haughn instructed Mr. Rafuse to obtain estimates for the full job. Final approval, after the estimates were obtained, would have to be budgeted for and then submitted to Town council.

[14] On Friday, July 25, 2003 Crouse & Sons returned to the building to check to see if the fibreboard had dried sufficiently to complete the repair work. Wade Joudrey and his foreman, Eugene Kaizer attended. Mr. Kaizer testified that when he attended the site he would not go on the roof immediately, but rather go in to the community centre and announce to whoever was there that they were going on the roof.

[15] On that day Mr. Joudrey testified that he and Mr. Kaizer went on the roof to determine whether the fibreboard was still wet. Mr. Joudrey said they were there to complete the job because he was worried about the roof being open and

exposed. Because the roof was still wet, Mr. Joudrey went to his truck and phoned several building supply centres to obtain new fibreboard so that he could replace what was on the roof on that day. Apparently he was able to obtain sufficient material to complete the job.

[16] Mr. Joudrey said that when they were on site, one of the Town workers arrived to unlock the door to the community centre. Mr. Keizer testified that, a person whom he could not identify, asked him what they were doing there and Mr. Kaizer told them that they were there to finish the roof. He was told not go on the roof as an inspector had to look at it. Mr. Kaizer called Mr. Joudrey on his cell phone. Mr. Joudrey was in the parking lot at the time making calls to obtain fibreboard. I am satisfied that Crouse & Sons were provided instructions from a Town employee not to go on the roof that day, thereby, preventing them from completing the job on July 25, 2003.

[17] Early the next week on Monday, July 28, 2003 Mr. Joudrey called Mr. Scott to inquire if the inspections had been done and whether he could come back and finish the job. He was not given permission to proceed. On Tuesday, the next day, Mr. Scott called him and said that one of the tarps was blowing. Mr. Joudrey said he told Mr. Scott to have this tarp secured. During this time, it is clear that Mr. Rafuse had been tasked with getting estimates for a full roof repair, but it is apparent that as of Monday, July 28, 2003 he had not obtained these estimates. We know further from the evidence that at the time of the loss no decision had been made by the Town, nor had estimates been obtained.

[18] Mr. Joudrey testified that he was never contacted by anyone from the Town to make the roof watertight, nor did any of the Town employees called to testify suggest that they had contacted him. Arnold Rafuse, the Town building inspector, had been on the roof with the Town engineer and Mr. Scott to do the initial inspection. Mr. Rafuse has passed away but, by agreement, his discovery testimony was entered into evidence. Mr. Rafuse testified that he had returned to the upper roof with potential contractors prior to the loss. He was concerned about how exposed the roof was and he commented to Marc Belliveau to that effect. At p. 17 of the discovery examination transcript, paras. 1 through 19, Mr. Rafuse said:

Q. As a result of your visit, did you report to anybody? Did you report to Peter what you found?

A. Just to Marc. Marc ... I was with Marc and I just reported what I saw to Marc.

Q. What did you report?

A. Marc was with me.

Q. Yes. What did you report to Marc?

A. I just said to Marc that, how long is this going to be expo ... open like this and he said I don't know.

Q. Why, why did you ask him that?

A. Well, just a tarp down is usually a, a short term, a short term thing to protect a roof while, while you're working at it.

Q. You were concerned that that portion of the roof was exposed to the elements?

A. I was a little concerned, yes.

Q. Yeah.

A. I was a little concerned, I have to admit that.

Q. Did you ...

A. That was my words to Marc.

[19] Further at p. 18, lines 1 through 4:

Q. You expressed that concern to Marc?

A. I expressed that concern to Marc and ... Marc or Robin, I'm not a hundred percent sure. But I imagine that's why they wanted me there, was to see how secure it was.

[20] Marc Belliveau is the Town engineer and is a professional engineer. He has twenty-three years experience as a municipal engineer. While he testified he had no formal training on buildings, he did have responsibility for Town buildings over

the years and, in particular, was involved in maintenance work on all Town buildings, including outside siding and roof. He was indirectly involved in roof repairs as part of his duties. He confirmed that he inspected the roof with Arnold Rafuse and Robin Scott.

[21] On cross-examination he agreed that if he had been told that the contractor was instructed not to do anything further to secure the roof, it would have been prudent for the Town to do something to secure it. He agreed that it was evident that the tarps were not fully secured and that the roof was not watertight.

[22] I am satisfied on the evidence that Mr. Rafuse, the building inspector, Mr. Belliveau, the engineer, and Mr. Scott were all aware or, should have been aware, of the vulnerable nature of the roof and, in particular, that the roof was only covered with a temporary covering which was not watertight. Despite this knowledge the Town took no action to have the roof secured or to instruct Crouse & Sons to do so.

[23] I am satisfied that what the Town did do was to give directions to Mr. Joudrey's company to do no further work on the roof. I am also satisfied that when Mr. Joudrey returned to complete the job on Friday, July 25, 2003 he was told not to go on the roof. Mr. Joudrey's evidence is consistent with the evidence given by other Town officials, including Mr. Scott, that estimates for the complete roof repair had not been obtained at the time of the loss, nor had the Town made any decision what to do with the community centre roof. I am satisfied that between July 21, 2003 and the date of the loss on August 2, 2003 the Town was attempting to obtain estimates to have the total roof repaired but that it had not been successful.

[24] No decision had been made by August 1, 2003. A heavy rainfall took place in Lunenburg on August 1st and 2nd. On August 2nd the heavy winds and rainfall caused water to leak into the building, resulting in damage which is the subject of this action. Mr. Scott confirmed that there were 12 days between the time when Crouse & Sons initially arrived on Monday, July 21st and when the damage occurred on Saturday, August 2, 2003.

[25] The Town has brought this action against Crouse & Sons for the resulting damage to the building claiming \$146,751.01. Crouse & Sons counter-claims for

payment for its work, in the amount of \$2,880 plus \$432 HST, for the total sum of \$3,312.

[26] The issues to be determined are the following:

- a) Is Crouse & Sons liable in contract for the damage caused by the roof leak at the community centre?
- b) Is Crouse & Sons liable in negligence for the damage caused by the roof leak at the community centre?
- c) Does the defence of *novus actus interveniens* apply to this case?
- d) Was the Town contributorily negligent?
- e) What is the quantum of damages sustained by the Town?

a) Is Crouse & Sons liable in contract for the damage caused by the roof leak at the community centre?

[27] The Town submits there was a valid contract in place at the time of the loss, and that Crouse & Sons breached an implied term of that contract that it would perform the roof repairs in accordance with good roofing practice and industry standards. As a result of that breach of contract, the Town says the community centre roof leaked, causing significant damages.

[28] The contract alleged by the Town is essentially an estimate prepared by Crouse & Sons dated August 16, 2002 and quoting a contract price of \$3,312. The Town argues that an implied term of the contract was that the job would be completed in a workmanlike manner in accordance with industry standards for good roofing practice. It relies on the good roofing guidelines, set out by the Canadian Roofing Contractors Association, which is explained in an expert report of an engineer, Ernie Porter, President of J.W. Lyndsay Enterprises Limited. Mr. Porter wrote two reports related to this matter, one dated August 20, 2003 and the other November 3, 2008. The latter report was prepared after he reviewed the discovery evidence of Mr. Joudrey, the President of Crouse & Sons. In cross-examination Mr. Porter agreed that the CRCA guidelines are merely guidelines for

association members. It is not mandatory that a roofing company be a member of this association. In his November 3, 2008 report he stated:

M. Crouse & Sons failed to provide a service consistent with good roofing practice in several ways. First, they failed to properly diagnose the problems with the roof and bid accordingly, had this occurred the wet insulation issue would have been dealt with prior to work commencing. Second, given that work started without knowledge of the roof assembly condition work should have ceased immediately upon discovery of wet insulation. This would have minimized the exposure and made a temporary repair more manageable. Third, tarps and plastic do not work at all on flat roofs. Fourth, their general approach - cutting with an axe and disposal of debris onto lower roofs, etc. are very unprofessional. In general, the approach taken by M. Crouse & Sons was not in accordance with good roofing practice and not consistent with the approach recommended by CRCA and common in the industry.

- [29] The particulars of the breach alleged by the Town are that Crouse & Sons:
- a) Failed to properly test the condition of the roof prior to commencing the repairs.
 - b) Failed to ensure that the community centre roof was sealed watertight at the end of the July 21, 2003 workday.
 - c) Continued removing the existing roof membrane when it knew the underlying boards were wet.
 - d) Failed to ensure that the community centre roof was sealed watertight at the end of the July 22, 2003 workday.
 - e) Installed a temporary covering that was inadequate.
 - f) Failed to advise the Town that the tarps covering the roof did not provide a watertight seal.
 - g) Failed to take any steps to protect the roof of the community centre or warn the Town when it knew rain was forecast for August 1st/2nd, 2003.

[30] On July 22, 2003 Crouse & Sons were instructed by Robin Scott to do no further work on the upper roof until such time as the Town had an opportunity to inspect the upper roof. Crouse & Sons was not able to complete the contract in a timely fashion, or at all, because of the instruction from the Town initially given by Mr. Scott. These instructions to do no further work continued until August 2, 2003 when the damage occurred to the building.

[31] Mr. Joudrey attended the site on Friday, July 25, 2003 to complete the repair work, including the installation of new fibreboard, which should have rectified the problem with the wetness, at least as far as the six foot strip that it had contracted to replace was concerned. I am satisfied that he was told by a Town staff member not to go on the roof. Obviously, the Town was waiting for Mr. Rafuse to obtain estimates. It is clear from the evidence that a contractor or contractors were on the roof during the 12 day period between the time when the job started on July 21, 2003 and when the loss occurred on August 2nd.

[32] During the 12 day period when the work was stopped, the Town made little, if any, progress in making a decision as to how to proceed. Town officials did not communicate with Mr. Joudrey to provide him with any instructions. They did not tell him to make the roof watertight. They did not provide him with a time frame in which he would be provided further instructions. During the same period Crouse & Sons were prevented from completing the job they contracted to do.

[33] I am satisfied that commencing with the inspection of the upper roof of the building by Mr. Rafuse, Mr. Belliveau and Mr. Scott on July 24, 2003 the Town knew that the tarp support was only temporary protection against the elements. The tarps were moved by Town staff and by various contractors who inspected the upper roof.

[34] The Town did not allow Crouse & Sons to do any further work on the upper roof including when they returned on Friday, July 25, 2003 with the intention of completing the repair work. According to Mr. Joudrey, he was ordering fibreboard so that the wet fibreboard could be replaced. Had Crouse & Sons been allowed to complete the work on Friday, July 25, 2003, the roof would have been watertight, their contract ended and presumably no damage would have occurred.

[35] The claim that Crouse & Sons breached their contract by failing to complete the work in a timely fashion is dismissed. The reason for the non-completion of

the contract was the refusal by the Town to allow Crouse & Sons to complete its obligations under the contract by the instruction to do nothing further. Crouse & Sons cannot be regarded as having breached the contract. The cause of the loss was the delay by the Town in making a decision as to what to do with the roof, and in instructing Crouse & Sons not to do anything further rather than any breach of contract as alleged by the Town.

b) Is Crouse & Sons liable in negligence for the damage caused by the roof leak at the community centre?

[36] The parties agree that there can be a concurrent duty in tort and contract.

[37] The Town submits that as a contractor hired by the Town, Crouse & Sons owed a duty of care to act as a reasonable roof contractor in the circumstances. The Town suggests that Crouse & Sons breached its standard of care in the following ways:

- a) The owner and employees were not properly trained or experienced in the field of commercial roofing, especially with respect to flat roof repairs.
- b) Once Crouse & Sons began removing the roofing membrane from the community centre roof, it knew or should have known, the extent of the moisture problem with the roof and should have accordingly ceased work.
- c) It failed to install a watertight covering on the roof when it knew the roof would not be completed on either July 21st or July 22nd.
- d) It failed to advise the Town that the community centre roof was not watertight.
- e) It failed to warn the Town when it knew that a rainfall event was forecast for August 1st/2nd.

[38] The Town claims that but for the breaches of its duty of care by Crouse & Sons, the community centre roof would not have leaked on August 2, 2003 and that but for the roof being left exposed to the elements without a watertight seal, this loss would not have occurred.

[39] Crouse & Sons says that it was not negligent, having been instructed by the Town on July 22, 2003 to do no further work until the roof was inspected. This instruction was given after Crouse & Sons had informed the Town of the wet condition on the roof.

[40] Crouse & Sons concede that if the facts were that they had placed the temporary covering over the upper roof on Tuesday, July 23, 2003, and had there been a heavy rain that night allowing water to penetrate into the building from the exposed portion of the upper roof, then clearly the company would be legally responsible for the ensuing damages. This is not, according to plaintiff's counsel, what occurred in the case. I agree. Instead, as a temporary measure, Crouse & Sons placed tarps over the exposed portion of the upper roof.

[41] I am satisfied that the Town knew and fully appreciated that the tarps only afforded a temporary or overnight protection against the elements. The roof had been inspected by a trained building inspector for the Town, an engineer and Mr. Scott. Employees of the Town had inspected the roof on several occasions and should have been aware of the temporary nature of the protection. The tarps were moved by Town staff and by contractors who inspected the upper roof. The Town delayed dealing with the problem in a timely fashion in that it refused to permit Crouse & Sons to do any further work on the upper roof up to the time the damage was incurred.

[42] I am not satisfied that there was negligence on the part of Crouse & Sons. I am not satisfied that it was negligent to not install a watertight covering on the roof because they fully intended to return on July 22nd to complete the roof repair. Mr. Joudrey testified that he was following the weather and the only sign of adverse weather was shortly before August 2nd. He returned to the job site on Friday of the first week to finish the repair. He was going to remove the fibreboard and replace it with new fibreboard. This would be consistent with the evidence of the Town's own expert, Ernie Porter, who testified that fibreboard cannot be dried, but it must be replaced. One of the allegations of negligence by the Town is that Crouse & Sons failed to advise its officials that the community centre roof was not watertight. I am satisfied, on the evidence, that at least three or more employees of the Town were aware that the roof was not watertight, including the building inspector, Mr. Rafuse, and the Town engineer Mr. Belliveau, who were tasked with inspecting the roof.

[43] At no time did any Town official instruct Crouse & Sons to make the roof watertight while the Town determined what it was going to do. On the contrary, their instructions, given on at least two occasions, were not to do anything further, including Friday of the first week when Mr. Joudrey and his crew came back to complete the job. Simply put, the cause of the loss was not any negligence of Crouse & Sons, but the delay by the Town in allowing them to complete the work under the contract.

[44] For the foregoing reasons, I find for the defendant Crouse & Sons and dismiss the plaintiff's action. Having so determined it is not necessary that I deal with the other issues raised, including damages.

Counterclaim:

[45] I allow the counterclaim of the defendant, Crouse & Sons, in the amount of \$2,880 plus HST for the total amount of \$3,312. I will hear the parties on costs should no agreement be reached.

Pickup, J.