SUPREME COURT OF NOVA SCOTIA

Citation: APM Construction Services Inc. v. Caribou Island Electric Ltd., 2012 NSSC 277

Date: 20120719
Docket: Hfx. No. 389863
Registry: Halifax

Between:

APM Construction Services Inc., Travelers Guarantee Company of Canada
Applicants

v.

Caribou Island Electric Limited, 3104607 Nova Scotia Limited c.o.b. Advanced Cabling Systems, Canada Revenue Agency, Her Majesty The Queen in Right of The Province of Nova Scotia as represented by the Minister of Transportation and Infrastructure Renewal
Respondents

Revised Decision:	The text of the original decision has been corrected according to the erratum dated July 30, 2012. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Peter P. Rosinski
Heard:	July 3, 2012, in Halifax, Nova Scotia
Counsel:	Joseph Herschorn, for the Applicants John Kulik, Q.C., for the Respondent, Advanced Cabling Systems Deanna Frappier, for the, Respondent, Canada Revenue Agency Michael Pugsley, for the Respondent, Her Majesty The Queen Respondent, Caribou Island Electric Limited, Self-Represented (Not Present)

By the Court:

Introduction

[1] On October 14, 2010, the Province retained APM Construction Services Inc. ("APM") to act as general contractor for a project to conduct renovations to the Bridgewater Provincial Building in Bridgewater, N.S. (the "Project").

[2] About October 29, 2010, APM retained Caribou Island Electric Inc. ("Caribou") to supply and install electrical, data and door access systems, security cameras, and fire alarms for the Project.

[3] Caribou retained 3104607 Nova Scotia Limited (carrying on business as Advanced Cabling Systems - "ACS") to supply and install cable systems in relation to Caribou's scope of work on the Project.

[4] About February 15, 2012, APM was served with an Enhanced Requirement to Pay (ERTP) by the Canada Revenue Agency ("CRA") with respect to debts owed by Caribou to the CRA totalling $183,351.44.

[5] About March 2, 2012 ACS notified APM that it claimed a lien with respect to work preformed on the Project by it for Caribou, in the amount of $85,347.83 plus HST. Then on March 7, 2012, ACS notified the Travelers Guarantee Company of Canada ("Travelers") of its claim under Payment Bond No. 90022381 (the "Bond") for work performed on the Project by it for Caribou in the amount of $85,347.83 plus HST.

[6] As of March 6, 2012, APM owed Caribou $94,441.36 (including HST) for work Caribou performed on the project. APM was thereby placed in a position which involved conflicting claims to the same monies: namely those it owed to Caribou, those it was potentially obligated to pay ACS under the lien claim and those it was potentially obligated to pay to the CRA.

[7] As general contractor, APM, arguably could pay the monies owing by itself to a subcontractor [Caribou] to CRA based on CRA's alleged "super priority" to the assets of that subcontractor for failure to pay taxes, **or** to ACS who is still owed monies by that subcontractor [Caribou] pursuant to the provisions of the *Builders Lien Act*.

[8] APM chose to make this Application in Chambers for an Interpleader Order in addition to other ancillary relief.

[9] A Court order for interpleader pursuant to *Civil Procedure Rule* 76 allows a person who is obligated to pay money or who has property, including monies, to deliver the property to an appointed person or to pay into Court the monies that are in dispute as a result of conflicting claims by others. The purpose is to preserve the property and allow a court to resolve the conflicting claims.

[10] In my view, the order is unnecessary, as I have concluded that this Court is already in a position to resolve the conflicting claims. To reach this conclusion requires a close examination of an earlier Nova Scotia Court of Appeal case that some of the parties argue is binding on this Court in these circumstances. While that case is helpful, I do not conclude that it is binding as the circumstances here are sufficiently different.

[11] Nevertheless, as the Court of Appeal Majority determined in *ICI Paints (Canada) Inc. v. J.M. Breton Plastering (1984) Co.* (1992) 116 NSR (2d) 385 (CA), I also conclude that the definition of “claimant” in the Bond in this case

includes ACS, a subcontractor with no contractual privity with APM the general contractor herein.

Background

[12] The pleadings herein were filed as follows:

(APM's) Notice of Application in Chambers - April 2, 2012;

its Amended Notice of Application in Chambers - May 7, 2012;

Notice of Contest from Advanced Cabling Systems ("ACS") - June 6, 2012;

Notice of Contest from Nova Scotia Minister of Transportation and Infrastructure Renewal ("TIR"), as represented by the Attorney General's counsel - June 21, 2012;

No materials were filed from Self-Represented Caribou Island Electric Limited ("Caribou")

[13] The evidence herein comes before me by way of the following affidavits filed:

April 2, 2012	Dennis Wadden - Vice President of APM;
May 1, 2012	Heidi Khoe - Claims Analyst for Travelers;
June 13, 2012	Karen Henderson - Complex Case Officer CRA Halifax;
June 22, 2012	Rick Murphy - Officer/Director ACS**.**

[14] Briefs were filed as follows:

June 22, 2012 - APM;

June 26, 2012 - ACS;

June 26, 2012 - CRA;

June 27, 2012 - TIR;

June 28, 2012 - APM Reply.

[15] Caribou has filed no materials and did not appear at the hearing.

[16] None of the affiants were cross-examined. The facts are not disputed.

[17] More precisely:

i) APM is the general contractor who worked on the recently built Bridgewater Provincial Building for the Province of Nova Scotia;

ii) APM had a payment bond regarding that work (No. 90022381 - see Exh. “H” to affidavit of Rick Murphy) with Travelers Guarantee [based on an Indemnity and Security Agreement - Exh. “A” to affidavit of Heidi Khoe].

Its most relevant portions read:

> NOW, THEREFORE THE CONDITION OF THIS OBLIGATION is such that if the Principal shall at all times promptly make payments to all Claimants for all work, materials or services used or reasonably required for use in performance of the Contract, or as the same be changed, altered or varied, to the satisfaction of the

Obligee, then this obligation shall be void, BUT OTHERWISE it shall remain in full force and effect.

PROVIDED FURTHER and the Principal and Surety hereby jointly and severally agree with the Obligee as Trustee that every Claimant who has not been paid in full before the expiration of a period of forty-five (45) days after the date on which the last of such Claimant's work or service was done or performed or materials were placed or furnished by such Claimant, may as a beneficiary of the trust herein provided for sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant, and have execution thereon.

IN THIS BOND where there is a reference to Claimant it shall mean any person, firm or corporation doing or performing any work or service or placing or furnishing any materials, or both, for any purpose related to the performance of the Contract: work, service and materials being constructed to include all water, gas, power, light, heat, oil, gasoline, telephone, service or rental equipment which is supplied or used for or in connection with the performance of the Contract.

iii) APM contracted Caribou to do work and Caribou contracted ACS to do work on that project;

iv) ACS performed its work and as of June 21, 2012 is owed $86,201.64 (including HST) by Caribou. ACS has since perfected its "lien" on the Crown property in as much as it can do so. It asserts that it has a lien against the statutory holdback fund that APM must maintain, as well as against any funds ultimately payable to Caribou on the project as a result of the bond;

v) Caribou is indebted to the CRA, which issued to APM an ERTP (enhanced requirement to pay) pursuant to s. 224(1.2) of the federal *Income Tax Act* for $183,351.41 on February 15, 2012. The ERTP asserts that APM must pay to the federal Crown any monies which are or become payable to Caribou up to the $183,351.41 amount - Exh. "C" to the affidavit of Dennis Wadden.

A partial payment of $17,090.96 was received via garnishment by the federal Crown from APM pursuant to the ERTP on March 6, 2012;

vi) APM owes Caribou $94,441.36 as of March 30, 2012, under Purchase Order No. 102170, yet has not paid Caribou this amount pending determination of the respective entitlements of CRA and ACS to those funds.

[18] One further matter must be noted. Since the property is owned by the Provincial government, strictly speaking a true lien could not previously or even now be registered against the land on which the project is located - see the January 1, 2005 amendments [ss. 3(2) and 3(4)] to the *Builders' Lien Act*, RSNS 1989, c. 277:

> **Application of Act**
>
> 3(2) A lien does not attach to and cannot be registered against the estate or interest in the land of Her Majesty in right of the Province.
>
> ...
>
> 3 (4) Where Her Majesty in right of the Province is an owner, the lien does not attach to the land, but constitutes a charge as provided in Section 13, and this Act applies without requiring registration pursuant to Section 18 of a claim of lien against the land.

[19] Section 13 of the Act refers to the holdback obligations of "the person primarily liable upon any contract under or by virtue of which a lien may arise".

Issues

[20] Should the Court grant the relief requested by APM and Travelers:

a) An interpleader order under CPR 76 (to allow the competing claims of CRA and ACS to be considered);

b) A declaration / order that:

i) By paying money into court by way of interpleader, APM has discharged its obligations under the Act in relation to any claims by ACS; and

ii) APM has complied with its obligations under the Bond thereby rendering the Bond void under its terms; and

iii) Travelers has no remaining liability to ACS under the Bond.

Positions of the Parties

ACS's position

[21] ACS and the counsel for the Attorney General of Nova Scotia both rely on the Nova Scotia Court of Appeal decision in *ICI Paints v. Canadian Surety Company* (1992) 116 NSR (2d) 385. They argue that the Court's decision, dealing with identical wording in a bond in similar circumstances, is binding on this court: *viz a* bond claimant who is a sub contractor without a contractual relationship to the principal / general contractor under the bond, even where the principal has made all contractually required payments, must still be paid for amounts it is owed by the bond surety Travelers (who then, under an indemnity agreement would be indemnified by APM).

[22] Specifically they argue that although APM claims that it will have met its obligations to Caribou if it pays all monies it owes to Caribou into Court under interpleader (while not making the surety Travelers liable to ACS according to APM), this claim is without merit because it is the interpretation of the bond that is determinative.

[23] Moreover, they argue that the wording of the bond and circumstances are indistinguishable from the *ICI Paints* case, and since 1992 the Province has continued to use identical wording in its bonds such that both APM as principal and Travelers as surety knew or should have known that in the circumstances of this case Travelers would be responsible to pay ACS' claim. Notably the obligee under the bond, that is the Province's position herein, supports ACS in this regard.

[24] ACS says the existence and wording of the indemnity agreement between APM and Travelers is irrelevant to interpreting the terms of the bond.

CRA's position

[25] CRA argues that interpleader is inappropriate here because there is no question but that CRA has "super priority" as against ACS over the APM monies owing to Caribou. That is - those monies became the property of the federal Crown once the ERTP was received by APM - ss. 224(1.2) and 224.(1.3) federal *Income Tax Act* and

Dias v. MacLean (1993) 123 NSR (2d) 231 (SC) per Bateman, J (as she then was);

Hazmasters Environmental Equipment Inc. v. London Guarantee (1998) 171 NSR (2d) 176 (CA) per Chipman, JA at paras. 26 - 31;

Trans Gas Limited v. Mid-Plains Contractors Ltd. et al. (1993) 101 D.L.R. (4th) 238 (Sask. CA).

[26] Moreover, if APM failed to comply with the ERTP it would itself be liable in an equal amount to CRA - s. 224(4); and if it complied, APM would be deemed discharged from the original liability to the extent of any payment - s. 224(2) federal *Income Tax Act*, and similarly relieved of its obligations to ACS as a lien claimant under the *Builders Lien Act*, RSNS 1989 c. 277, as amended.

[27] CRA requests that, if this Court allows the interpleader, CRA be permitted to participate in a further hearing “to be set by this Court within the existing application for the purpose of determining entitlement to the moneys” without further filings or appearances.

APM's position (reflecting also that of Travelers).

[28] APM argues that:

a) The Court of Appeal decision in *ICI Paints Inc. v. Canadian Surety Co.* (1992) 116 NSR (2d) 385 (CA) per Freeman, JA does **not** bind the Court in this case because:

i) The liens legislation in place in 1992, did not protect sub trades on provincial Crown projects and that explains in large measure why the Court concluded that the wording of the bond (identical wording in that case to this case) was interpreted broadly enough to allow as "claimants" thereunder sub contractors who had no contractual relationship with the general contractor;

ii) the Majority did not address the effect of any indemnity agreement between the surety and the principal (or stated differently: That contractors are required to indemnify their bonding companies if their claims have to be paid under a bond - paras. 37 - 44 ACS brief); and furthermore

iii) APM argues that its interpretation of the Bond is "objectively sensible" because:

a) For the bond's wording, which provides that the obligation thereunder will be satisfied if claimants are paid "to the satisfaction of the obligee [Province]", to make sense it must mean that the Principal [APM] is only obligated to pay those amounts that arise as a result of APM's contractual obligations since if APM does so, the owner / obligee [Province] would then be protected from "being the target of a lien claim";

b) "the only reasonable view is that the parties [to the bond] intended that a claimant would be entitled to payment under the Bond if the Principal [APM] failed to fulfill its obligations under the Act" - para. 49 - June 22, 2012 brief - APM;

c) "... under the interpretation urged by ACS satisfaction of the Bond's condition is entirely contingent upon the remote,

> unrelated financial and tax affairs of the subcontractor [in this case Caribou]. The parties to the Bond could not have reasonably intended such remote circumstances to give rise to the surety's liability.

b) if the Court is not bound by *ICI Paints* to require Travelers to pay the claim (which may mean APM may have to be responsible for the loss), the Court should grant the requested relief because:

i) Even though CRA argues that it should directly be paid the monies from APM based on its priority according to the legislation and jurisprudence, APM should be relieved of the responsibility of having to decide which Claimant - CRA or ACS has the priority claim by permitting an interpleader order;

ii) APM notes that CRA has not commenced a proceeding for an Order to be paid directly, [and although in its written brief it notes that CRA has not filed a Notice of Contest (see CPR 38.07) - because CRA's June 13 filing attempt was rejected by Court staff as late - all parties agreed that CRA

> is entitled to participate as if it had filed a Notice of Contest] so CRA is limited to arguing for relief that has been pleaded - and the only relief pleaded that favours CRA's position is interpleader.

Analysis

[29] Though not strictly necessary, to better appreciate the context in this case, it is helpful to summarize some of the provisions of the *Builders Lien Act*, RSNS 1989, c. 277. The Act is entitled: "An Act to establish liens in favour of builders and others". In a nutshell, its main attributes are the "holdback" provision and the related lien sections.

[30] The holdback and lien on the property are intended to provide some readily obtainable security of payment for persons having provided work, services or materials to an owner of the affected property.

[31] The general provisions of the Act are neatly summarized in a recent article:

A claim for lien in Nova Scotia must be filed within 60 days of the last work or supply of materials or services. The same deadline applies to all lien claimants. The lien must then be "perfected" by both commencing an action and registering a certificate of pending litigation within 105 days of the completion of the work or the provision of services or materials. The claim for lien must be accompanied by a verifying affidavit, which can be sworn by an agent with personal knowledge. In Nova Scotia, the owner is required to hold back 10% of the contract price or each progress payment, and must maintain the holdback amounts until 60 days after the contract is substantially performed, at which time the holdback may be reduced to 2.5% until full completion.

(Captured succintly in **Mechanics and Builders Liens in Atlantic Canada,** Doing Business in Atlantic Canada Summer 2011 per Robert M. Dysart LLB.)

[32] The Law Reform Commission of Nova Scotia reviewed the Act in its Discussion Paper March 2012 and stated:

HOLDBACKS

The *Act* requires an owner to hold back 10% from any payment on a building contract for a certain period of time. In the event that a subcontractor, supplier or employee of the general contractor goes unpaid, the unpaid party may register a lien (a security interest) against the property. Once the time period for holding the holdback has passed, the owner may pay the holdback directly to the lien holder in order to discharge the lien.

Successive parties in the contract chain must also hold back 10% of any payment they may make to their subcontractors (such as suppliers and sub-subcontractors), for the benefit of persons even further down the contract chain (*e.g.,* employees).

The holdback is released according to certain milestones set out in the *Act*. The full 10% must be held for sixty days after the time when the contract is "substantially performed". Substantial performance is defined in the *Act* as the

time when the work under the contract is ready for use, or is being used, for the purpose intended, and any remaining work can be completed for no more than 2.5% of the contract price. Sixty days after substantial performance, 75% of the holdback may be paid out to the person entitled on the contract. The remaining amount (2.5% of the contract price) may be paid when all of the work to be done on the contract is completely performed, provided no proceedings have been brought to enforce a lien in the meantime. The sixty days for release of the holdback is consistent with the time for registering a lien against the property, which must be done within sixty days of the completion of the work for which the lien is claimed, or else the lien expires. Once sixty days has passed, in other words, any unregistered liens for work done prior to substantial completion will have expired, and there is no reason to retain more than 2.5% in respect of work which may remain to be done to reach total completion.

The holdback ensures that owners are protected against paying twice, in the event that a general contractor defaults in payment to a subcontractor, employee, supplier, etc. The owner is not liable to the subcontractor for any amount beyond the holdback as long as no lien is filed. The owner will be liable to a lien holder, to the extent the lien holder goes unpaid after the lien is registered and notice in writing is given to the owner. But up to the point when the owner has written notice of a lien, he or she may pay the contractor up to 90%, without fear of being liable for more than the 10% holdback to an unpaid subcontractor who registers a lien on the property. In other words, though the lien forms a charge or security on the property for the unpaid amount, once the owner has paid the general contractor, with no notice of a lien, the lien secures only the lien holder's claim to a share of the 10% holdback.

Progressive release

The current *Act* treats the holdback as a single fund, to be released (up to 75%) upon substantial completion of the contract, and fully paid out upon total completion. A subcontractor who completes work early in the project (*e.g.*, foundation pouring) must wait until the end of the project to receive his or her share of the 10%. No interest is payable in the meantime - interest is only payable if the owner delays in releasing the holdback at the appropriate time. But should the *Act* allow an early subcontractor to obtain its portion of the 10% upon completion of its work? The owner would be authorized to release the subcontractor's portion upon issuance of a certificate of completion of the subcontractor's work, without fear of liability to any lien holder who registers a lien later in the project.

Most other provinces provide a right along these lines.

[33] Section 6 specifically reads:

> 6 (1) Unless he signs an express agreement to the contrary and in that case subject to Section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees and appurtenances, and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.
>
> (2) A person who rents to an owner, contractor or subcontractor equipment used on land or in such place in the immediate vicinity thereof as is designated by the owner, contractor, subcontractor or agent thereof, performs a service within the meaning of subsection (1). R.S., c. 277, s. 6; 2004, c. 14, s. 6.

[34] Notably the level of protection is different for persons working on properties owned by Her Majesty in Right of the Province, as in this case - see s. 3:

3 (1) Nothing in this Act extends to any public street or highway or to any work or improvement done or caused to be done thereon.

(2) A lien does not attach to and cannot be registered against the estate or interest in the land of Her Majesty in right of the Province.

(3) Where the circumstances referred to in Section 6 apply to land in which Her Majesty in right of the Province has an estate or interest but Her Majesty is not an owner, the lien may attach to the estate or interest of any other person in that land.

(4) Where Her Majesty in right of the Province is an owner, the lien does not attach to the land but constitutes a charge as provided in Section 13, and this Act applies without requiring registration pursuant to Section 18 of a claim of lien against the land.

(5) Where the owner of a property is Her Majesty in right of the Province, the claim for lien made in accordance with Section 19 or 20 may be served upon the Minister of Justice and Sections 24 to 29 apply mutatis mutandis.

(6) Subject to this Section, this Act is binding upon Her Majesty in right of the Province.

(7) Notwithstanding Section 18 of the Proceedings against the Crown Act, no action shall be brought against Her Majesty in right of the Province under this Act unless thirty days previous notice in writing has been served on the Attorney General, in which notice the name and residence of the proposed plaintiff, the cause of action and the court in which it is to be brought shall be explicitly stated. 2004, c. 14, s. 4.

[35] For those working on properties not owned by the Province, s. 13 provides:

> 13 (1) In this Section, a contract under which a lien can arise pursuant to Section 6 is deemed to be substantially performed
>
> (a) when the work or improvement is ready for use or is being used for the purpose intended; and
>
> (b) when the work to be done under the contract is capable of completion or correction at a cost of not more than two and one-half per cent of the contract price.
>
> (2) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of sixty days after the contract is substantially performed, ten per cent of the value of the work, service and materials actually done, placed or furnished as mentioned in Section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.
>
> (3) Sixty days after the contract is substantially performed the amount required to be retained pursuant to subsection (2) may be reduced to two and one-half per cent of the value of the work, service and materials actually done, placed or finished and this balance of two and one-half per cent may be retained by the person primarily liable upon the contract until all required work is performed completely.

(4) The lien shall be a charge upon the amount directed to be retained by this Section in favour of subcontractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(5) All payments up to ninety per cent of the contract price or actual value made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by one subcontractor to another subcontractor, before notice in writing of such lien given by the person claiming the lien to him, shall operate as a discharge pro tanto of the lien.

(6) Payment of the percentage required to be retained pursuant to subsections (2) and (3) may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the periods mentioned in subsections (2) and (3) unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as hereinafter provided.

(7) Where, pursuant to subsection (3), anyone reduces the holdback being retained, everyone retaining the holdback shall pay to the person to whom he is primarily liable ninety-seven and one-half per cent of the value to the payer of the services and the materials supplied by the person who has received the return of the holdback referred to in subsection (3).

(8) Anyone retaining a holdback who does not make payment within sixty-five days immediately following substantial performance as permitted by subsection (3) or subsection (7) is liable to the person entitled to such payment for interest on the amount which should have been paid at the prime rate of interest then commonly charged by chartered banks plus two per cent unless there has been agreement on some other rate of interest.

(9) As funds retained are paid eventually according to entitlement under the provisions of this Act, the liability of the owner to a lien claim will be reduced in the same proportion as such payments. R.S., c. 277, s. 13; 2004, c. 14, s. 7; 2005, c. 8, s. 3.

[36] Clearly those working on properties owned by the Province can place liens on such properties, yet they constitute a "charge as provided for in section 13" rather than a true lien.

[37] One way to effect alternate payment to subcontractors other than from the owner via the lien process, is through a surety pursuant to a bond between the Province, the general contractor and the surety, as in this case. This situation arises as a result of a contract between the general contractor and surety.

[38] Such situations allow subcontractors on a work site, who do not have privity of contract with the general contractor, to make an earlier claim against the surety for the full amount owing to them, rather than making a claim under the holdback regime for possibly only a portion of the full amount owing to them by the general contractor and only payable after “substantial performance” of the contract.

[39] In 1992 the Court of Appeal in *ICI Paints* was faced with interpreting the terms of such a bond, in very similar factual circumstances but in the context of an arguably materially different statutory background.

[40] At that time, the supplier of paints (ICI Paints) to Breton Plastering, was not paid, and had no recourse against the Crown owner of the property, nor against the general contractor.

[41] Justice Freeman (Roscoe, JA concurring) found that the proper interpretation of the bond was such that even subcontractors with whom the general contractor had no privity of contract could claim against the bond / surety for payment.

[42] The Majority upheld Justice Nunn's conclusion that the definition of "claimant" in the bond was sufficintly broad and "clear and unambiguous" to allow ICI Paints to claim under the bond:

> In short, the parties entered into a formal contract which they called a payment bond in which it was agreed that the surety should pay claimants such as ICI who were given the right to sue the surety directly. The document may not have been a true payment bond. But it was a contract. In my view, it must be enforced.

[43] Justice Hallet in a vigorous dissent would have denied ICI Paints the right to sue under the bond. In his view the Majority lost sight of "the general principles of suretyship and the requirement to interpret the contract in such a manner that leads to a reasonable rather an absurd result".

[44] He construed the document as a contract of suretyship, and held that "the princpal's contract and the bond or undertaking of the surety are to be construed together as one instrument... [and] although the bond under review in this case is described on its face as a "payment bond" it is in reality a performance bond; that is a guarantee by [the surety] that [the general contractor] would perform its obligations to "claimants".

[45] He reasoned that since the general contractor itself only had obligations to pay those parties with which it had contracts, and because the surety could only be liable for defaults by the general contractor, therefore the surety was only obligated to those claimants who had contractual unpaid claims against the general contractor.

[46] As to the import of *ICI Paints* on the present case, I conclude, in similar fashion to the Majority, that ACS can claim directly against the surety. I find the intention of the obligee, the principal and surety herein to be that ACS is a proper "claimant" under the bond. I observe in support of my conclusion:

i) The Province has not changed the wording of the bonds it uses in 20 years - which I infer is deliberate;

ii) though a different corporation is surety in the present case, it was content to maintain in 2007, the same *ICI Paints* bond's wording, [in spite of its counsel's claims that this Court should now differently construe that wording in light of changes to the legislation (the 1992 definition of "owner" did not include, while the 2007 definition of "owner" did include, Her Majesty in Right of the Province)];

iii) both the surety and Province may safely be taken to be sophisticated parties; APM must also be so taken given the evidence in the affidavit of Dennis Wadden V.P. for APM;

iv) both the Majority and dissent in *ICI Paints* considered the contract between the principal and surety ["The intention of the

parties must be divined from the bond itself and the agreed statement of facts... the contract is incorporated as an intrinsic part of the bond and necessary to its interpretation but... offers little guidance as to the specifics of the various bonds it requires... it must therefore presumed that the bond conforms with the contract requirements" per Freeman, JA; "While the terms of the contract do not provide a great deal of assistance in the interpretation of the bond there is some help..." per Hallett, JA];

v) although the Indemnity and Security Agreement executed May 15, 2007 in Ontario is according to its terms (Clause 61 - Applicable Law) to be "construed in accordance with the laws of [Ontario]" - affidavit of Heidi Khoe sworn April 26, 2012 - the Bond herein is clearly drafted based on the Province's insistence of continuity of the form of such bonds previously used in the Province. Thus the usefulness of the Indemnity and Security Agreement to the end of assisting in the interpretation of the Bond is limited;

vi) notably, no wording in the Indemnity Agreement clearly addresses the extent of the obligations that the principal and surety have intended. This may be because the Agreement also governs the numerous other entities referred to in the Agreement. Moreover, given the letterhead of APM (Exh. “B” Affidavit of Dennis Wadden) which suggests APM has

operations throughout Canada, it would seem that APM and Travelers deliberately agreed upon a generalized Agreement, which they realized would necessarily be applied in multiple jurisdictions. The upshot of this is that since different jurisdictions have different legislation and jurisprudence of which the parties are properly considered to be aware, the parties may also therefore be deemed to have known that the context would inform an objective view by a court of their intentions under the Agreement. Thus not having insisted on any different wording in the Bond, APM and Travelers objectively may be taken to have intended that, in spite of any amendments to the legislation in Nova Scotia, they would be bound by the broad definition of “claimant” endorsed by the Majority in *ICI Paints*;

vii) moreover, I think the Bond's unambiguous wording should prevail, as that is the bench mark against which sub contractors would have assessed whether to take the risk of bidding on such jobs - the Bond is intended to be a deliberate comfort to subcontractors;

viii) maintaining the interpretation of "claimant" broadly also accords with the commercial reality that many smaller subcontractors are involved in projects regarding property owned by the Province, which by it having a simple standard

> bond in a place facilitates their access to, and confidence in, such projects as a worthwhile endeavor.

[47] I therefore conclude that the broad interpretation of "claimant" adopted by the Majority in *ICI Paints* is also appropriate in this case, as I find the parties to this Bond intended to be bound by such a broad definition.

[48] Consequently, I declare that ACS is entitled to recover from the surety for the monies it is owed by Caribou; and without deciding it in this case, I recognize that the surety would usually expect indemnification from the principal in such cases.

The Canada Revenue Agency Claim

[49] Regarding the amount that APM owes to Caribou, APM seeks to pay into Court that amount which CRA argues is deemed to be the property of CRA per s. 224(1.2) of *Income Tax Act* RSC 1985 c. I as amended. Moreover, CRA argues that APM will be statutorily excused / absolved of having to pay Caribou that

amount because of s. 224(2) of *Income Tax Act*, otherwise APM will itself directly be liable to CRA pursuant to s. 224(4) of the *Income Tax Act*.

[50] Regarding the status of the CRA, I observe that:

> a) CRA was served at the behest of APM on April 26, 2012, for a July 3, 2012 hearing;
>
> b) CRA did file a Notice of Contest on June 13, 2012, which was rejected by Court staff as being late filed according to Ms. Frappier;
>
> c) all counsel were agreeable to permitting CRA to participate as if its Notice of Contest had been accepted for filing, since they and the Court had received the brief and affidavit of CRA.

[51] I permitted CRA to participate as if it were a Respondent which had filed a Notice of Contest as it was in the interests of justice to do so.

[52] APM sought an order directing it to pay into Court $94,441.36 being the amount that APM owes to Caribou, rather than paying CRA directly the

$94,441.36 towards Caribou's $183,351.41 debt to CRA. APM argues that ACS, while under threat of not being paid by Travelers pursuant to the bond, also wished APM to pay Caribou's $94,441.36 into court.

[53] Moreover, APM argues that CRA asks the Court to grant relief that has not been pleaded.

[54] To these arguments I say:

i) CRA has been permitted to have the benefits of a Respondent's status; and

ii) not only was it pleaded in its Notice of Contest, but CRA's "relief" is effectuated by operation of law, and there is no good reason to postpone what appears inevitable to me - i.e. that APM must pay Caribou's monies in the amount of $94,441.36 to CRA and so will be absolved of its debt to Caribou;

iii) by my declarations and Order, I will have removed APM's need for a court to decide on the entitlement to the disputed monies by way of interpleader.

Conclusion

[55] In spite of the able arguments vigorously mounted by counsel for APM, I dismiss the APM Motion for an Order for Interpleader pursuant to CPR 76; I declare that ACS is entitled to be paid pursuant to the Bond herein monies lawfully owed it by Caribou ($86,201.64 as at June 21, 2012) and in so paying ACS, Travelers will have discharged its obligations under the Bond *vis à vis* ACS; I declare that by paying directly to CRA forthwith the $94,441.36 it owes Caribou, APM will have no further obligation to CRA arising from monies it owed Caribou.

[56] Given all the circumstances here, I order that each party bear its own costs.

J.

SUPREME COURT OF NOVA SCOTIA

Citation: APM Construction Services Inc. v. Caribou Island Electric Ltd., 2012 NSSC 277

Date: 20120719

Docket: Hfx. No. 389863
Registry: Halifax

Between:

APM Construction Services Inc., Travelers Guarantee Company of Canada

Applicants

v.

Caribou Island Electric Limited, 3104607 Nova Scotia Limited c.o.b. Advanced Cabling Systems, Canada Revenue Agency, Her Majesty The Queen in Right of The Province of Nova Scotia as represented by the Minister of Transportation and Infrastructure Renewal

Respondents

Revised Decision: **The text of the original decision has been corrected according to the appended Erratum dated July 30, 2012.**

Judge: The Honourable Justice Peter P. Rosinski

Heard: July 3, 2012, in Halifax, Nova Scotia

Counsel: Joseph Herschorn, for the Applicants

John Kulik, Q.C., for the Respondent,
Advanced Cabling Systems
Deanna Frappier, for the, Respondent,
Canada Revenue Agency
Michael Pugsley, for the Respondent,
Her Majesty The Queen
Respondent, Caribou Island Electric Limited,
Self-Represented (Not Present)

Erratum:

[57] At pages 33 and 34, paragraphs [52] , [54] ii) and [55] the words “less the garnished $17,090.96" should be deleted.