SUPREME COURT OF NOVA SCOTIA

Citation: *Allterrain Contracting Inc. v. Grafton Developments Inc.*, 2020 NSSC 226

Date: 20200819
Docket: Hfx No. 461012
Registry: Halifax

Between:

Allterrain Contracting Inc.

Plaintiff/
Defendant by Counterclaim

v.

Grafton Developments Inc.

Defendant/
Plaintiff by Counterclaim

SUPPLEMENTAL DECISION ON INTEREST AND COSTS

Judge:	The Honourable Justice M. Heather Robertson
Heard:	December 9, 10, 11 and 12, 2019 in Halifax, Nova Scotia
Decision:	February 20, 2020 (2020 NSSC 66)
Final Written Submissions on Interest & Costs:	August 6, 2020
Supplemental Decision:	August 19, 2020
Counsel:	James D. MacNeil, for the plaintiff/defendant by counterclaim Jeff Aucoin, for the defendant/plaintiff by counterclaim

Robertson, J.:

[1] This is my supplemental decision respecting both the matters of interest on the contract made between the parties and costs.

[2] Both parties made written submissions in the matter of interest owing on the contract and costs in the cause.

Interest on the contract

[3] It is the plaintiff, Allterrain Contracting ("Allterrain") submission that:

> . . . the rate of interest was an agreed upon contractual term between the parties. The evidence at trial was quite clear on the topic:
>
> - Tab 4 of the Joint Exhibit Book (Exhibit 1 at trial) clearly indicates that interest would be charged at the rate of "2.5% per month compounded";
> - The evidence of Nassim Ghosn was that he recalled this particular clause of the contract (clause 28) because he did acknowledge in cross-examination that his initials and handwriting were on the document changing the payment term to 30 days (as evidenced at Tab 4 of the Exhibit Book), "30" is handwritten twice at clause 29;
> - You will also recall that Andrew Rodgers clearly testified that this particular clause was discussed with Mr. Ghosn at their Tim Hortons meeting at the time the contractual terms were agreed upon and the document executed;
> - You will further recall that despite the defendant's submissions that only every second line of the contractual terms were visible at the time the document was executed, the interest component is on one of those supposedly visible lines. As you will further recall, the plaintiff's submissions were that the illegibility of the document was never pled, that an experienced businessman like Mr. Ghosn would not agree on contractual terms that he was not aware of, and in the overall circumstances taking into account all of the evidence, that argument that every second line was not legible was not supportable.
>
> It remains Allterrain's position that interest was properly pled, was an agreed upon contractual term between the parties and Allterrain argues that it is entitled to 2.5% interest compounded monthly from the date its account was due and owing (which would be from December 21,

> 2016) as set out in paragraph 9 of Allterrain's July 2, 2020 costs submissions. Allterrain does note that the same agreed upon contractual terms calls for 10% of the contract value to be paid to Allterrain for each month the account is in arrears. As set out at paragraph 11 of Allterrain's July 2, 2020 costs submissions, Allterrain repeats and submits that the total interest owing should be $12,748.01. Arguably, an additional two months interest should be added to that outstanding amount which would make for a total amount of $13,456.23.

[4] The defendant, Grafton Developments Inc. ("Grafton") argue that:

> . . . interest is a specific term of the contract that appears to have been ignored by the parties throughout the Project. Grafton Developments submits that the evidence was not clear that the rate of interest in the terms and conditions (2.5%) was discussed or agreed to.
>
> In fact, this percentage was contradicted by the Allterrain Invoices (Exhibit 1, Joint Exhibit Book, Tab 24) which show an interest rate of 2% not 2.5%. Clearly there was no agreement or meeting of the minds on the point.
>
> Further there was no evidence that interest was charged or paid at any time during the performance of the Contract. It should not be awarded now.
>
> However, if interest is to be awarded by Your Ladyship, Grafton's submission is that it should be only awarded at the rate of "2.5% per month compounded" as noted in the terms and conditions. With the judgment amount of $30,569.97, interest calculated at 2.5% compounded monthly for 3.5 years results in a total amount of interest of $2,792.35.
>
> If interest is awarded at all, Grafton says that it should be awarded in this amount.
>
> Allterrain takes the position that 10% of the contract value should be paid per month of arrears pursuant to the contract. I do not agree with counsel for Allterrain that this was the evidence at trial. Further, even if supported by evidence (which we dispute), this is not an interest amount, should not be the subject of a costs decision and should not be awarded in the circumstances.

[5] In my view, it is clear on the evidence that Mr. Ghosn knew the contract terms in detail and discussed them in detail with Andrew Rodgers before the agreement was executed. I accept the evidence that Mr. Ghosn initialed the contract in his own handwriting, as shown on clause 29, where he changed the payment terms to 30 from 15 days. These terms were legible and acknowledged by the defendant.

[6] I do not accept the defendant's position that there was no agreement on the rate of interest on the contract.

[7] I award interest as per the terms of the contract from December 21, 2016 for a period of 3.5 years in the amount of $12,748.01.

Costs

[8] I have considered the written submissions of counsel for the parties. In particular, I have considered the issue of whether I should address and increase the award of costs because the plaintiff made an offer to settle five days before the trial commenced that was neither withdrawn nor accepted.

[9] Grafton relies on *Mega Roofing and Waterproofing Ltd. v. N.D. Dobbin Ltd.*, [1996] N.J. 136,143 Nfld & P.E.I.R. 14; 1996 CarswellNfld 127. In that case, Osborn J. considered the Nova Scotia Rule 41A (as it then was) and held that the offer to settle should be made at least seven days before trial, for the good reason of the consistent and predictable application of the rule. He cited Grant J. in *Barron v. Fridthjoffsson*, [1990] N.S.R. No. 319, 105 N.S.R. (2d) 284 at paras. 20-22.

[10] With respect to a formal offer not accepted Rule 10.09 provides:

> Determining costs if formal offer not accepted
>
> 10.09 (1) A party obtains a "favourable judgment" when each of the following have occurred:
>
> (a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;
>
> (b) the offer is not withdrawn or accepted;
>
> (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
>
> (2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
>
> (a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;
>
> (b) seventy-five percent, if the offer is made more than twenty-five days after pleadings close and before setting down;
>
> (c) fifty percent, if the offer is made after setting down and before the finish date;

> (d) twenty-five percent, if the offer is made after the finish date.

[11] I agree with Grafton that Allterrain although successful at trial, having not made a formal offer within the required seven days before the trial has not obtained a "favourable judgment" as set out in Rule 10.09(1). I decline to use my discretion in increasing the award for the offer that was made five days before the trial began.

Tariff A

[12] Applying Tariff A, costs should be awarded in the amount of $6,250.00 based on the lien amount of $30,569.97 and $12,250.00 based on the counterclaim amount of $121,181.00.

Builders' Lien Act

[13] Grafton submits:

> This was a Builders' Lien Trial. The matter had two claims, the lien claim and the counterclaim. The trial lasted 4 days. The main factual issue was whether the remediation work, that was not completed by Allterrain, was part of the contract or contracts between the parties. This issue was clearly relevant to both the lien claim and the counterclaim as it determined what work Allterrain was responsible for.
>
> Section 41 of the *Builder's Lien Act* ("the *Act*") is relevant. It states as follows:
>
> > 41 (1) The costs of the action under this *Act* awarded to the plaintiffs and successful lien holders, shall not exceed, in the aggregate, an amount equal to twenty-five per cent of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge who tries the action may direct.
>
> Grafton acknowledges that the costs applicable to its counterclaim would not be affected by this section. However, the Lien claim clearly should be. 2.5% of the lien amount is $7,642.49. Of curse [sic], this is the amount paid into Court for costs, for that very reason. (I note that this is noted in para. 27 of Allterrain's submission, but in its table in para. 34 there is a type making it $7,742.49.)
>
> Per s. 41 of the *Act* the costs of the lien action "shall not exceed, **in the aggregate**, an amount equal to 25% of the amount of the judgment, besides actual disbursements".
>
> . . .

> With respect to costs, aggregate means the total of ***all*** costs elements, related to the lien claim shall not exceed 25% of the lien amount. The only amount excluded is disbursements.
>
> The *Rules* provide that in addition to the tariff amounts, costs should included $2,000.00 per day of Trial. The trial was four days long. As noted above, the major issue related to both the lien claim and counterclaim. Grafton submits that an appropriate allocation of time would be to allocate two days of trial to the lien claim and two days to the counterclaim.
>
> Accordingly the costs attributable to each claim should be:
>
> **Lien claim -** $6,250 (Tariff) + $4,000 (2 trial days) = $10,250 limited to $7,642.49 per s. 41 of the *Act* = $7,642.49.
>
> **Counterclaim -** $12,250.00 (Tariff) + $4,000 (2 days trial) = $16,250

[14] I agree with these submissions and agree that the costs related to the lien claim including two days of trial at $2,000 per day are therefore limited to the amount of $7,642.49. Costs relating to the counterclaim including two days of trial $16,250.00.

[15] The parties agree $2,000 is the appropriate sum for disbursements.

[16] Therefore, the total award for costs and disbursements to Allterrain is the amount of $25,892.49.

[17] Along with the award of interest on the contract herein made to Allterrain of $12,748.01 Grafton shall pay to Allterrain the total of $38,640.50.

Justice M. Heather Robertson