SUPREME COURT OF NOVA SCOTIA
Citation: *Masontech Inc.v. Aaffinity Contracting and Environmental Ltd.*, 2014 NSSC 164

Date: 20140502
Docket: Hfx No. 408739
Registry: Halifax

Between:

Masontech Inc.

Plaintiff

v.

Aaffinity Contracting and Environmental Ltd.

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	January 9, 2014, in Halifax, Nova Scotia
Final Written Submissions:	January 23, 2014
Counsel:	Joseph Herschorn, for the Plaintiff James D. MacNeil, for the Defendant

By the Court:

Introduction

[1] This is a motion by the plaintiff for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04.

Background

[2] This proceeding arises out of a construction contract. Defence Construction Canada (DCC) contracted Aaffinity, as general contractor, to conduct repairs to the drainage system, foundation and retaining walls of the Halifax Armoury. DCC manages the real property of the Department of National Defence on behalf of the federal Crown. Aaffinity retained Masontech as a subcontractor. This proceeding arises out of a disagreement between Aaffinity and Masontech respecting the amount due under the subcontract.

[3] Masontech's scope of work included dismantling and rebuilding the Armoury's north and south retaining walls. The original contract was priced partly as a lump sum, for amounts that could be priced in advance, and partly as by unit

pricing, with amounts due to be determined as the work was carried out. The lump sum price was $330,000.00 plus HST. This included $115,500.00 as the original price for Masontech's work on dismantling and rebuilding the south retaining wall.

[4] Masontech's work on the retaining wall began in March 2011. The parties agreed that the work on the north wall would be done before that on the south wall, which was expected to be completed in the summer of 2011. Masontech's contract price for dismantling and rebuilding the south wall was calculated on the understanding, firstly, that the work would be carried out in mild temperatures, and secondly, that the wall was built entirely of granite. Masontech would dismantle the wall and rebuild it with the existing granite. However, as it turned out, it was September 2011 before Masontech was in a position to dismantle the south wall.

[5] The delay in startng the masonry work on the south wall meant that the rebuilding work would have to be completed during the winter, or be delayed until the spring of 2012. Doing the work in the winter would raise the cost. According to the affidavit of Michael Welling, Masontech's president, "the workspace around the masonry construction or repair site must be enclosed and heated in order to

ensure proper curing (hardening) of mortar between stones." DCC required that masonry be handled at temperatures of at least ten degrees Celsius.

[6] Once Masontech began dismantling the south wall, it was discovered that, rather than being built entirely of granite, the wall was a combination of granite, brick, and ironstone. DCC then required that bluestone be used in place of the brick and ironstone on the front of the wall. This, too, meant increased costs.

[7] After an exchange of correspondence between the parties in mid-October 2011, Aaffinity's site manager, Timothy Graves, approached DCC with a number of issues for which answers were needed in order to complete the project by the end of the following January.

[8] In late October and early November 2011, Masontech provided several quotes to Aaffinity respecting aspects of the work. On October 27, Mr. Welling provided an "estimate to recess stones for installation of stainless steel cramps at the south retaining wall … based on an estimated 424 cramps at $15.00 each," with the final amount to be adjusted "according to the actual number of cramps installed." This estimate was in the amount of $6,360.00 plus HST. On October 31 Mr. Welling provided a "price to supply, cut and fabricate" seven granite stone

units to be used for replacement at the south retaining wall, in the amount of $25,070.00 plus HST. On November 1, he provided a "price to supply and install approximately 1000 square feet of bluestone at the south retaining wall ," including "loss of production relating to winter conditions," but not "enclosure or temporary heat." This was in the amount of $85,818.75 plus HST.

[9] The first three of the October-November estimates were signed by Mr. Welling, to the attention of Brian MacDonald, and appeared on Masontech's letterhead. The fourth, dated November 3, was not on letterhead, nor was it explicitly over Mr. Welling's signature. This estimate stated:

> Should work at the south retaining wall proceed through the winter we will be claiming for costs relating to loss of production and additional general conditions.
>
> These costs are in excess of the price submitted for temporary enclosure, sheds, hoisting scaffold and heat.
>
> Progress will be significantly slowed down and the work made more difficult as stones will have to be stored in a heated enclosure before being moved to the work area. It will not be possible to move stones into the work area, or to set them in place with your heavy equipment, which means significantly more time consuming handling by Masontech.
>
> Our price for loss of progress and related costs would be: $49,650.00 plus HST.
>
> We trust that this meets with your approval and look forward to receiving your instructions in due course.

[10] By early November 2011, Masontech had dismantled most of the south retaining wall. Based on the original contract value, Masontech valued the portion of the work done to that point at $11,550.00. It was necessary, however, to revise the contract value to reflect the changed circumstances. Of the original figure of $115,500.00 for the south wall, $82,000.00 was attributable to rebuilding. Masontech proposed a revised arrangement whereby the rebuilding component of the original contract price would be reduced by 80 percent. This would result in a revised original contract value for work related to the south retaining wall of $49,900.00. According to Mr. Welling, the remaining 20 percent of the rebuilding cost "was maintained in the revised original-contract price to account for the fact that there were ongoing costs associated with the south retaining wall before the winter work was commenced," such as storing the dismantled stone.

[11] In response to Masontech's proposal, Mr. Graves at Aaffinity stated in an e-mail dated November 3, 2011, that "[w]e want all additional costs and winter working costs to be included in your quote for the South Retaining Wall… We believe Masontech is entitled to keeping a percentage … of the credit" for the original south wall price. On November 4, Mr. Welling responded with the

particulars of what Masontech refers to as the "winter price." He wrote,"[s]ee attached summary for pricing at the south retaining wall, this is based on information and direction received to date and we reserve the right to adjust should additional charges arise." Attached to the e-mail was a list setting out the following:

Summary for Rebuilding South Retaining Wall	
Original estimate to rebuild Granite	$82,000.00
Estimate to supply/install bluestone	$85,818.00
Loss of progress/Winter Cond/G.C's	$49,650.00
Revised Estimate for rebuilding granite/bluestone	$217,468.00

[12] Masontech particularized each of these items into their labor, materials and equipment components. Additionally, the document set out the additional items Masontech was asked to quote on: recess for cramps ($6,360.00); seven pieces of new granite ($25,070.00); granite steps ($43,905.00), and enclosures and hoisting required for work in a heated work site in the winter ($92,000.00).

[13] In an e-mail to Mr. MacDonald dated November 17, 2011, Mr. Welling indicated Masontech's agreement to several price adjustments requested by Aaffinity: heating enclosures were reduced from $92,000.00 to $88,000.00, loss of

production cost from $49,650.00 to $46,650.00, and overhead from $3,450.00 to $1,800.00, for a total adjustment of $8,850.00. Mr. Welling noted in his affidavit that Masontech had neglected to adjust the winter price to reflect the reduction for loss of production (also referred to as delay/impact); as such, the correct amount of the Winter Price would be $214,468.00. (For the sake of simplicity I will continue to refer to the higher amount, which appears in the documentary evidence. Any necessary adjustment can be dealt with if required.)

[14] Following receipt of Masontech's proposal, Aaffinity sought change orders from DCC. DCC approved a change order dated November 24, 2011, indicating an increase in the expenditure for the retaining wall of $129,964.32. There is no evidence suggesting that this change order was seen by anyone at Masontech. On November 22 and 28 Mr. Welling received e-mails from Peter Zwicker at DCC and from Mr. MacDonald at Aaffinity. These messages indicated, respectively, that DCC had approved change orders for the south wall work and for the necessary heating enclosures. Mr. Welling indicated in his affidavit that Aaffinity did not take issue with Masontech's November 4 prices (aside from the requested adjustments). He also indicated that Masontech was not privy to the details of the

change orders. Nothing in the evidence suggests that Masontech was in fact privy to the details of communications between Aaffinity and DCC.

[15] Masontech maintains that over the next several months it carried out the work in accordance with its quote on November 4, 2011, invoicing Aaffinity by way of monthly progress claims based on the winter price. Progress claims were submitted by Masontech and paid by Aaffinity for December 2011, January 2012, and February 2012. Each claim billed for work done in accordance with the winter price. For instance, the invoice of December 31, 2011, included a line item headed "South Retaining Wall (Revised) – See Attached," in the amount of $10,873.40. Reference to the relevant summary page – headed "South Retaining Wall Revised" – led to the following entry:

Revised Value	$217,468.00
Complete This Claim	5%
Complete to Date	5%
Value to Date	$10,873.40
Billed This Claim	$10,873.40

[16] The invoice itemized the original contract value, as revised, separately, making reference to a credit of $65,500.00 on November 4, 2011, and the revised original contract value of $49,900.00.

[17] Aaffinity paid similar invoices dated January 31 and February 29, 2012. In each instance, the claim included a summary page citing the winter price and indicating progress to date. Mr. Welling stated in his affidavit that Aaffinity paid each of the December, January and February invoices.

[18] Additional monthly progress claims were submitted, and the work continued between March and May. In July 2012 Aaffinity provided a cheque for $50,000.00, not referenced to any specific invoice. Masontech applied this cheque to two invoices from April 2012 (in amounts of $3,524.00 and $543.38), and to part of a third invoice from the same month, in the amount of $71,842.66, while crediting an overpayment of $57.53 by Aaffinity from an earlier invoice.

[19] The plaintiff claims that the entirety of the contract has been completed and seeks judgment in the amount of $286, 846.86.

[20] In its defence, Aaffinity claims that Masontech overbilled and is seeking to recover "extra payment for work that fell within its regular scope of work," while refusing to clarify the source of the alleged additional amounts. (Masontech denies that Aaffinity sought such clarification.) Aaffinity also pleads that "Masontech has overbilled for approved change orders," a claim on which the defence elaborates as follows:

> 6 … Aaffinity states that with respect to change order no. 19, the total amount of the change order was to be $129,964.32, of which $116,967.89 was for Masontech's work. Masontech invoiced Aaffinity a total of $217,468.00 ($100,500.11 more than the change order). Masontech billed for this extra amount on a number of invoices including three of the invoices set out in paragraph 7 of the statement of claim. Aaffinity states that it has requested clarification of this billing from Masontech, including supporting documentations and explanations of work and has not received same. Aaffinity states that Masontech has overbilled with respect to other change orders.

[21] There is no evidence that Masontech was aware of the details of the change order.

[22] Masontech says any additional items on the unpaid invoices were extras required by DCC and approved by Aaffinity, with documentary support.

[23] Aaffinity's copy of the April 30 invoice contains a notation indicating that the balance of the invoice was owed, after delivery of the cheque for $50,000.00.

On this invoice, the notation "Contract" relates to work done under the original contract scope, including progress claims for some of the remaining "General Conditions" and some of the remaining scope of the original contract price for the South retaining wall. Specifically, Masontech says, in all of the ongoing invoices, the term "General Conditions" refers to overhead expenses (such as cell phones, insurance and bonding, vehicles and sites provision). Aaffinity had paid this invoice amount on earlier progress claims. The "Contract" amount also includes a portion of the remaining value of the granite portion of the original south retaining wall price, relating to work unrelated to the winter changes, including clean-up and demobilization. The April invoice also included a further amount for "above grade pointing," as well as "scaffold and enclosures," items for which Aaffinity had paid earlier progress claims.

The Law on Summary Judgment on Evidence

[24] A motion for summary judgment on evidence is authorized by *Civil Procedure Rule* 13.04, which provides, in part:

> 13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law…

[25] A judge hearing a summary judgment motion "must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim": *Rule* 13.05(1). In that instance, the judge "may determine the amount, or order an assessment, accounting or reference": *Rule* 13.05(2).

[26] The Nova Scotia Court of Appeal recently considered the test on a motion for summary judgment in *Coady v. Burton Canada Co.*, 2013 NSCA 95. The 16-year-old plaintiff was severely injured when he fell and broke his neck while snowboarding at a mountain resort. He sued the resort owners, as well as the snowboard manufacturer, alleging that they negligently failed to maintain the site and enticed him to borrow a professional snowboard without verifying his age, experience or competence. The defendants moved for summary judgment, alleging

that there were no material facts in dispute and that the plaintiffs had no chance of success. The motions judge dismissed the motion.

[27] In the majority judgment, Saunders J.A. considered the principles governing summary judgment. He referred to the leading case of *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, where the Supreme Court of Canada said, at para 27 (some citations omitted):

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15... Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[28] Saunders J.A. made it clear that the burden on the first stage of the summary judgment analysis belongs to the moving party, who has the burden of satisfying the court that there are "no genuine issues of material fact requiring a trial." At this stage, there is no burden on the responding party. The moving party has the onus of "satisfying the Chambers judge that summary judgment [is] a proper question for consideration," which carries an "evidentiary burden of

showing that there [is] no genuine issue of material fact which would necessitate a trial" (para 38).

[29] If the moving party fails to establish that there are no genuine issues of material fact requiring trial, the inquiry ends. It is not necessary to go on to the next stage and consider whether the claim or defence has a real chance of success. If, however, the moving party meets its burden of showing that there are "no material factual matters in dispute" (the merits of either party's position being irrelevant at this stage), it is necessary to move to the next stage (para. 42). Saunders J.A summarized the analytical framework for stage 2 of the analysis at para 42 of *Coady*:

> [T]he judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?

[30] Saunders J.A. further provided a list of "well-established legal principles" concerning summary judgment litigation, at para. 87:

1. Summary judgment engages a two-stage analysis.

2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied his evidentiary burden proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the respondent party has to evidentiary burden of proving that its claim (or defence) has a real chance of success. This stage of the inquiry engages a somewhat limited assessment of the merits of each party's respective positions.

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

> ….
>
> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
>
> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
>
> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[31] While *Burton* remains the leading case directly interpreting Rule 13.04, I believe the court must incorporate the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, in its reasoning on summary judgment on evidence. I note in particular the summarized comments of Karakatsanis J. for the court, at para. 2, calling for

> a culture shift … in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails "simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[32] The court cited "an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the

litigation, and its timeliness, given the nature and complexity of the litigation": *Hryniak*, at para. 31, citing *Szeto v. Dwyer*, 2010 NLCA 36, at para. 53. Karakatsanis noted that such a principle was applied to the Nova Scotia *Civil Procedure Rules* in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, with respect to the rules governing discovery and disclosure.

[33] It has already been suggested that *Hryniak* has general application and should be considered in summary judgment applications in Nova Scotia: see e.g. *Proost v. Ferncroft Equities Ltd.*, 2014 NSSC 99; *Pettipas v. Hunter Noel Holdings Ltd.*, 2014 NSSC 70. The discussion of the technical aspects of summary judgment in *Hryniak* is concerned with the Ontario rule, which provides much broader powers to the judge than does Rule 13.04. However, it is clear that the court intended the policy aspects of the decision to be of general application.

Stage 1 of the summary judgment analysis

[34] At the first stage of the analysis, it is necessary for Masontech to establish that there are no material facts in dispute. Both parties are required to "put their

best foot forward" in order to allow the court to make this determination, based on the evidence, but without consideration of the merits.

[35] It is first necessary to be clear on what must be proven. The issue, in substance, is whether the parties were *ad idem* as to the terms on which the south wall winter work was to be done. Masontech maintains that they were, and that the winter price as set out in the November 4 e-mail, with subsequent minor adjustments, served as the basis for those terms. Aaffinity claims that it never agreed to the November 4 figures.

[36] Masontech argues that since Aaffinity paid earlier progress claims, it accepted the total contract prices for the relevant items, and is therefore responsible for the payment of the later progress claims. There is no dispute that Aaffinity paid those invoices, nor is there any dispute that Aaffinity paid the progress claims without any protest or concern being raised as to their terms. Masontech's says it completed the work on the expectation of payment, and would not have continued the work otherwise.

[37] Both parties have provided affidavits: Masontech relies on an affidavit and a rebuttal affidavit of Mr. Welling, and Aaffinity relies on an affidavit of Mr.

Osmond. Mr. Osmond's affidavit appears to rest heavily on a spreadsheet apparently prepared by one Mike Pottie, with whom Mr. Welling said Masontech had no contact. As Masontech points out, this spreadsheet appears to be hearsay.

[38] Masontech maintains that there are no facts in dispute with respect to the claim that the unpaid invoices are owing. Aaffinity, however, submits that there are material facts in dispute, which I paraphrase as follows:

(1) Whether the parties agreed that Masontech was permitted to invoice the amount of $217,468.00.

[39] Mr. Osmond stated in his affidavit that Aaffinity never agreed to the amount of $217,468.00, and that Masontech did not submit a "formal quote" for this amount. He claimed that the only "formal quotes" were the four dated between October 27 and November 3, 2011. It became evident in oral argument that Aaffinity's position is that it could be only be bound by what counsel and Mr. Osmond describes as a "formal quote," including the four quotes of late October and early November 2011, but not the November 4 e-mail from Mr. Welling setting out the winter price. According to counsel's submissions, one of the key indicators of a "formal quote" is that is appears on the firm's letterhead, although

no authority is cited either defining a "formal quote" or for the significance of a letterhead. Moreover, the fourth quote relied upon by Aaffinity, dated November 3, was not on letterhead.

[40] Masontech's position, simply put, is that Aaffinity paid a series of progress claims based on the winter price of $217,468.00, as conveyed to Aaffinity on November 4, 2011. As such, Masontech argues, there is no genuine issue as to whether Aaffinity accepted the winter price.

[41] In the hearing, I asked the parties for authority for and against the proposition that having commenced paying under the progress claims, Aaffinity thereby accepted the winter price. Both parties provided submissions. Aaffinity objects to Masontech's post-trial submissions, claiming that it is "inappropriate" to raise new arguments that allegedly go beyond those requested by the court. That request was for authorities respecting the proposition that Aaffinity's payment of the progress claims should prevent it from later disputing the amounts. I am satisfied that both issues raised by Masontech are relevant to that question, and I am willing to consider them on that basis.

[42] Masontech submits that the concepts of acceptance through conduct and estoppel by conduct provide such a foundation. Masontech relies, first, on the principle of acceptance through conduct, citing *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, [1964] SCR 614, where Ritchie J. said, for the court:

> It must be appreciated that mere failure to disown responsibilty to pay compensation for services rendered is not of itself always enough to bind the person who has had the benefit of those services The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before binding contract will be implied.

[43] Masontech further relies on *Nicholas v. Pictou Landing Band Council* (2000), 189 N.S.R. (2d) 64, affirmed at 2001 NSCA 60, where the defendant's continued payment under the terms of an apparently expired contract led to the conclusion that there was continued acceptance of the terms. In *Irving Oil Limited v. Incan Ships Limited* (1979), 26 N.B.R. (2d) 512, [1979] N.B.J. No. 169 (N.B.Q.B.), the trial judge held that the defendant, being aware of a potential retroactive adjustment to oil prices, accepted that possibility by continuing to pay for oil. The decision was reversed on appeal: 30 N.B.R. (2d) 319, [1980] N.B.J. No. 120 (N.B.C.A.), but Hughes C.J.N.B. agreed with the trial judge that the continued payment constituted acceptance by conduct, based on the reasoning in

Saint John Tugboat; there could be, he stated, "no doubt that Incan's conduct in making further purchases of fuel oil at domestic prices was evidence that it consented to the terms proposed by Irving" (para. 50).

[44] Masontech also cites *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 12 B.L.R. (2d) 274, [1994] O.J. No. 817 (Ont. Ct. J. (Gen. Div.)), where, after buying chemicals directly and later through a related company, the defendant de-authorized the related company from buying on its behalf. However, the orders continued, and the defendant contended that it was not liable on the subsequent orders. The defendant had allowed the situation to arise, and Spence J. concluded that the plaintiff was entitled to look to the defendant for payment in accordance with the previous arrangement (para 28). He continued:

> 29 It was suggested that to so hold would amount to a determination that failure to disown responsibility for invoices rendered is enough to bind a person who has had the benefit of goods or services so invoiced, a position which it was said was expressly rejected in the decision of the Supreme Court of Canada in *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.* [1964] S.C.R. 614 at p. 622. However, the court's rejection of that principle is clearly a very qualified one, if it is even to be considered a rejection. What Ritchie J. states at p. 622 is that such a failure to disown responsibility "is not of itself always enough" to bind the recipient of the services (emphasis added) and he goes on to say:
>
> > The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

> 30 In the present case, the circumstances are such that Hall-Chem could reasonably infer that the disputed orders had been placed pursuant to the Vulcan/Marketing arrangement...

[45] Masontech argues that it could only infer from Aaffinity's payment of the progress invoices that Aaffinity had accepted the prices set out therein. Aaffinity, however, says the cases relied on by Masontech are distinguishable. The acquiescence in *Saint John Tug Boat* and *Nicholas*, it is submitted, concerned the renewal or extension of pre-existing contracts, rather than a change or amendment. In *Saint John Tug Boat* it was held that each invoice constituted a new offer, and that payment of the invoices constituted acceptance. This was not the case here, where Masontech takes the position, in effect, that the progress claims were increments of an existing single contract. Aaffinity contends that these cases do not establish that paying progress invoices amounts to accepting their terms.

[46] Aaffinity goes on to argue that in the construction context, offer and acceptance must pre-date the issuance of progress payments, and that if the progress payments include amounts falling outside the original contract, the payor may dispute them, even after payment. In *Kareway Homes Ltd. v. 37889 Yukon Inc.*, 2013 YKCA 4, the parties disagreed on whether a construction contract had

been on a fixed-price or a cost-plus basis. There was a written development agreement, as well as two estimates. The project broke down when the owner objected that the total cost exceeded that of the contract plus agreed-upon extras. The Yukon Court of Appeal held that the trial judge correctly concluded that the development agreement created a fixed-price contract, and ordered the builder to return overpayments made on periodic invoices.

[47] In *McNamara Construction Co., a division of Tarmac Canada Inc. v. Newfoundland Transshipment Ltd.* (2002), 213 Nfld. & P.E.I.R. 1, [2002] N.J. No. 127 (Nfld. S.C.T.D.), the defendant counterclaimed for alleged overpayments on progress invoices, but was unable to establish the payments had actually been made. As Aaffinity concedes, this case is distinguishable due to the presence of a "pay now, audit later" provision in the contract.

[48] In *Corner Stone Holdings Ltd. v. Savage*, 2002 BCSC 1255, the defendant customer stopped paying the general contractor's invoices upon discovering double-billing, non-payment of subcontractors, and deficiencies in the work. The court allowed the defendant's counterclaim, finding that he was entitled to a return of overpayments on periodic billings. Similarly, in *Concord Construction Inc. v.*

Camara (1992), 4 C.L.R. (2d) 263, [1992] O.J. No. 1649 (Ont C.J. (Gen. Div.)), the defendants counterclaimed for recovery of overpayment on progress invoices. The court was required to interpret the contract, concluding that it was cost-plus, as the defendants claimed, not fixed price, as the plaintiff contractor claimed.

[49] In addition to acceptance by conduct, Masontech advances a related argument based on the doctrine of estoppel by representation, as described in *Scotsburn Co-operative Services Ltd. v. WT Goodwin Ltd.*, [1985] 1 S.C.R. 54, [1985] S.C.J. No. 2, where Dickson C.J.C. cited, at para 26, the following description from Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed. 1977), at p. 4:

> ... where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

[50] Masontech takes the position that Aaffinity's payments could only be representations through its conduct that it agreed to the prices as set out in the

invoices, so that Aaffinity's conduct induced Masontech to continue working on the project, to its detriment. Aaffinity points out that Scotsburn does not deal with "the payment of progress invoices, and/or how the payment of same can amount to a representation." While correct, this does not render the case irrelevant.

[51] Aaffinity appears to suggest that it was necessary for Masontech to plead estoppel, although no Rule or principle of pleading is cited. Aaffinity goes on to argue that, in any event, there is no evidence that could establish the elements of estoppel, particularly representation. Aaffinity adds the somewhat ambiguous argument that Masontech could not have been performing the work solely on the basis of representations, since it was acting in accordance with a contractual obligation to perform the work.

[52] The question that this issue revolves around is whether there is a genuine issue as to whether the parties were *ad idem*. Masontech's position is that Aaffinity's conduct amounted to an acceptance of the terms as set out in the November 4 e-mail. In Masontech's view, Aaffinity is attempting to "muddy the factual waters by raising for the first time billing issues concerning items Aaffinity already paid for, either fully or partially…" In effect, Masontech maintains that

Aaffinity is estopped from litigating such issues. The contract did not include a reconciliation process which would permit the defendant to revisit invoices it had already paid. Further, Masontech submits that to revisit paid or partially-paid invoices would jeopardize the integrity of the progress claim billing model in the construction industry.

[53] I am satisfied that Aaffinity could accept the winter price terms by conduct. But this does not end the matter. I am also satisfied that Aaffinity would not be thereby estopped from disputing specific charges and payments.

(2) Whether Masontech double-billed the sum of $16,400.00.

[54] According to Mr. Osmond's affidavit, the figure of $217,468.00 "appears to include $82,000.00 being the cost of rebuilding the south retaining wall, when only 80% of that cost was backed out of the lump sum contract, leaving 20%, or $16,400.00, remaining in the lump sum contract price."

[55] Mr. Welling stated that $16,400.00 represented 20 percent of the credit against the cost of rebuilding the south retaining wall that remained in the revised original contract price. Masontech submits that Aaffinity agreed to this amount by paying the December 2011 and January 2012 progress claims, which both included

amounts based on this revised price. Masontech says there is no genuine issue, since there is no dispute that Aaffinity paid progress claims that included 20 percent of the credit, being $16,400.00.

> ***(3) How Masontech assigned the value of $82,000.00 to the rebuilding of the south retaining wall, and whether this amount was "appropriate."***
>
> ***(4) Whether the remainder of the $115,500.00 value of the South retaining wall is $21,950.00, what it encompasses, and whether this amount should be "backed out" of the lump-sum amount.***

[56] Mr. Osmond states that after deducting the November 2011 amount for dismantling and rebuilding – $11,550.00, being ten percent of the total – there would have been $103,950.00 remaining, according to Masontech's figures. Deducting $82,000.00 from the remaining amount leaves $21,950.00 unaccounted for, according to Aaffinity.

[57] Masontech submits that the asserted issue respecting the calculation of the figure of $82,000.00 is not a genuine issue; the question, rather, is whether Aaffinity agreed to pay for the work on the south retaining wall in accordance with both the original contract and the winter price. Masontech says this is indisputable, in view of the progress payments Aaffinity made based on both amounts. As to the

allegedly unaccounted-for $21,950.00, Masontech points out that Aaffinity paid progress claims based on this amount, representing the remaining amount for dismantling the south retaining wall (not rebuilding it) as of the end of October 2011.

> ***(5) Whether the repointing of window wells is included in the scope of the lump sum contract.***
>
> ***(6) Whether the remaining non-change order items invoiced are within the scope of the lump-sum contract or, alternatively, whether Aaffinity agreed to pay for these items.***

[58] Aaffinity also disputes certain "miscellaneous charges" that Mr. Osmond asserted were not justified under the lump-sum contract, the unit price contract, or change orders. He refers to charges for cutting stone to recess stainless steel cramps at the north retaining wall; repointing window wells (which he says "would have been included in the lump sum contract"); reinstallation of a wing wall and steps at the Cunard St. entrance; costs associated with a spare granite block; and charges for loosening stones.

[59] Masontech maintains that these items were paid for, apart from "loosening stones," and cannot be in issue. Mr. Welling's rebuttal affidavit cited

correspondence with Tim Graves of Aaffinity about re-pointing window wells, including extra work orders from 2011 signed by Mr. Graves. Mr. Welling cited communications with Aaffinity personnel respecting the other disputed items. With respect to "loosening stones," he referred to an Extra Work Order signed by Tim Graves, dated January 19, 2012. Mr. Welling confirmed in his rebuttal affidavit that the charge for "scaffold and enclosures" was overbilled by $500.00. Generally speaking, Masontech says Aaffinity cannot now dispute that it agreed to pay for items that it actually paid for.

(7) Whether Masontech is double-billing for winter progress claims by including them in its quote for the installation of the bluestone and in a separate quote.

[60] In his affidavit, Mr. Osmond refers to Aaffinity's November 4, 2011, e-mail to Mr. Welling requesting that Masontech's quote for the south retaining wall include "all additional costs and winter working costs…" He then refers to the "formal quotes" provided by Masontech on October 27, October 31, November 1, and November 3. As noted earlier, Mr. Osmond maintains that these were "the only formal quotes received in association with the south retaining wall." The November 3 quote was for "loss of progress/winter conditions," in the amount of

$49,650.00, later reduced to $46,650.00. According to Mr. Osmond, this quote was a double-billing of amounts "explicitly included" in the November 1 invoice.

[61] Masontech points out that Aaffinity paid progress claims based on the winter price, which included both the cost of providing bluestone (including the loss-of-progress cost associated with providing it) and the loss-of-progress costs associated with other winter work (that amount being $46,650.00). As such, Masontech says, there is no issue as to whether Aaffinity agreed to these costs.

(8) Other points of dispute

[62] Masontech points to several other instances where Mr. Osmond's affidavit appears to take issue with items for which Aaffinity had already made partial payment in the December, January and February progress claims. (I note that unlike the items discussed above, these are not specifically identified by Aaffinity in its submissions as material facts in issue.) An example is the revised original contract price for the south retaining wall was credited at $65,600.00. Another is the loss-of-progress cost included in the winter price, in the amount of $46,650.00.

[63] Aaffinity also says DCC's change order 19 limited the amounts that could be charged by Masontech under the winter price. According to Aaffinity, the reference in change order 19 to a credit of $65,600.00 was erroneous, and corresponded to the credit taken off the lump-sum contract price. Masontech responds that change order 19 was never brought to its attention and that Aaffinity paid three progress claims based on the winter price.

[64] Masontech says it cannot be subject to "budgets" or "ceilings" under change orders between Aaffinity and DCC. In addition to change order 19, this would include change orders 28, 29, and 32; Masontech billed Aaffinity in accordance with the amounts it had quoted for these items, not the change orders between DCC and Aaffinity. As for other change orders respecting Masontech's work – including orders 3, 6, 11, 17, and 18 – Masontech notes that Aaffinity paid them, and is therefore not in a position to dispute them.

Are there material facts in dispute?

[65] Masontech asserts that it was entitled to payment in accordance with the November 4 e-mail setting out the so-called winter price for the work on the south

retaining wall. In substance, the claim is one of breach of contract. Masontech maintains that there are no facts in dispute relevant to the question of whether Aaffinity was required to pay on these terms.

[66] Aaffinity does not deny that there was a contractual relationship between the parties, that of contractor and sub-contractor. It does deny, however, that it the parties agreed to terms based on the winter price. The course of correspondence that led to the November 4 e-mail is not disputed, including Mr. Graves's November 3 request to Mr. Welling for "all additional costs and winter working costs to be included in your quote for the South Retaining Wall." There is no dispute that Masontech replied with a quote setting out the costs for rebuilding the south retaining wall during the winter, along with other additional costs. Aaffinity does not deny that this message was received, and indeed the undisputed evidence is that several weeks later Mr. Graves sought and received certain amendments to the November 4 prices.

[67] Aaffinity, in contrast, relies on the earlier series of quotes from Masontech, most (but not all) of which appear on Masontech's letterhead. Aaffinity suggests, with no supporting legal authority, that the earlier "formal quotes" must trump the

November 4 e-mail in setting the terms of the agreement between the parties. Counsel went so far as to say in the hearing that had the quote been on a letterhead, "we wouldn't be here." There was no evidence that the parties ever agreed on the earlier "letterhead" quotes as the basis for the price. The evidence simply indicates that these quote were part of the ongoing exchanges between the parties that ultimately led to Masontech's submission of the winter price.

[68] Aaffinity also suggests that Masontech was bound by details of DCC change orders, despite having no privity with DCC or knowledge of the contents of the change orders, which were between Aaffinity and DCC. There is no dispute that Aaffinity informed Masontech that DCC had approved the relevant change order for the retaining wall; there is also no dispute that Aaffinity did not inform Masontech of the specific terms that DCC approved.

[69] There is no dispute that Masontech subsequently commenced the work, and began submitting monthly invoices which specified the total amounts attributable to the work on the south wall, and which were consistent with the November 4 e-mail. Aaffinity paid several of these progress claims with objection. There is no dispute that the winter price figures appeared in the invoices that Aaffinity paid.

There is no evidence that Aaffinity objected to these figures. Aaffinity's position, in essence, is that it did not specifically indicate its assent to the winter price terms, and therefore the parties were not *ad idem*. However, as *Halsbury's* indicates, the question is not what Aaffinity "thought or felt it was doing," but rather "what a reasonable person in the position of the other party … reasonably understood the other to have said or done": *Halsbury's Laws of Canada – Contracts* at §HCO-6.

[70] Aaffinity argues that Masontech is asking the court to draw an impermissible inference on summary judgment. This raises the question of what degree of inference-drawing is acceptable on summary judgment. In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, the court said, "[t]he chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts" (para 11). This is distinct from drawing an inference from *disputed* facts, against which the Court of Appeal warned in *Burton* (para. 87).

[71] I am satisfied that there are no material facts in dispute with respect to whether the parties objectively agreed to the winter price as the basis for the winter

work. As between the parties, Aaffinity's conduct could not reasonably have led to any other conclusion, and there is no evidence on the record to suggest otherwise.

[72] Even if there is no material fact in dispute that the November 4 e-mail formed the starting point, however, there still remains the question of Aaffinity's allegations of overpayment and double-billing. Masontech says Aaffinity cannot object to such payments now, having paid several progress claims. However, Masontech has not provided any authority for the proposition that the absence of a contractual provision allowing the payments to be revisited estops Aaffinity from making such claims. The caselaw provides examples of situations where parties did exactly that in circumstances where construction contracts had broken down.

[73] I am satisfied that there is a dispute as to the amounts properly payable. Masontech's answer on most of the specific items disputed by Aaffinity is that partial payment amounted to acceptance. I am not satisfied that this is adequate to establish that there is no genuine issue as to the amount actually owing. There was no formal written contract. The parties' relationship was a fluid one, as is often the case in an ongoing construction project. While the November 4 e-mail may be the focal point with respect to pricing, I cannot conclude that the mere act of payment

of progress invoices insulates Masontech from any dispute about the amounts ultimately due. I am not satisfied that this can be done without weighing evidence and making clear findings of fact, starting with the specific objections raised by Aaffinity as to the amount claimed.

[74] If there is a genuine issue as to the amount owing, Masontech submits that the court can determine the amount owed on summary judgment. Civil Procedure Rule 13.05(1) provides that "[a] judge hearing a motion for summary judgment on evidence must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim." Rule 13.05(2) provides that the "judge may determine the amount, or order an assessment, accounting or reference."

[75] Aaffinity concedes that $115,403.76 is owing. In his affidavit, Mr. Osmond indicates that Aaffinity takes the position that "$859,596.23 (HST excl) is the value of the work performed by Masontech, on the basis of the lump sum contract being revised to $236,900.00." He states that Aaffinity has paid $744,192.47 (HST excl). The difference is $115,403.76. Aaffinity's counsel confirmed in the hearing that at least $115,000.00 is owing.

[76] Masontech submits, given that each party is required to "put its best foot forward" on summary judgment. As such, it is submitted, the evidence that would be available on a debt or accounting process would be no better than that available now. I am not convinced, however, that an adequate assessment of damages is possible here without resort to weighing evidence and potentially making findings of credibility that are not permissible on summary judgment. I would therefore grant judgment to the plaintiff on the basis that the parties agreed to the terms of the November 4 e-mail. Subject to an assessment of the amount actually due, taking into consideration amounts actually paid and Aaffinity's claims of double-billing and unwarranted charges.

Conclusion

[77] Accordingly, Masontech shall have judgment, subject to assessment of the amount due.

[78] If the parties are unable to agree on costs, I request that written submissions be filed no later than May 30, 2014.

LeBlanc, J.