IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Santec Construction v. Town of Windsor, 2003NSSC197

Date: 20031001
Docket: S.H. 173161
Registry: Halifax

Between:

Santec Construction Managers Limited, a body corporate

Plaintiff

v.

Town of Windsor

Defendant

Before: The Honourable Justice Glen G. McDougall

Heard: September 4, 2003

Counsel: George W. MacDonald, Q.C., solicitor for the plaintiff
Barry J. Alexander, Esq., solicitor for the defendant

McDougall, J.:

[1] This is an application by the Town of Windsor ("Windsor") for an order for disclosure of documentation previously requested in a notice to produce for inspection filed on June 5, 2003.

[2] The respondent, Santec Construction Managers Limited ("Santec"), takes the position that it has provided everything of relevance requested by "Windsor". If it has failed to provide any information then it is only because it is not of relevance to the action.

BACKGROUND

[3] "Santec" filed suit against "Windsor" for alleged breach of contract and breach of good faith in the awarding of a contract for the construction of a water treatment plant. The action was started on August 7, 2001.

[4] "Windsor" filed its defence on September 19, 2001. It denied the existence of a contract between the parties. It further stated that it acted fairly and in good faith in awarding the contract to another bidder even though "Santec's" bid was lower.

[5] Discovery hearings were conducted on November 27, 2001, December 6, 2001 and May 14, 2002.

[6] On February 19, 2003 "Windsor" filed an amended defence.

[7] On March 12, 2003 "Santec" filed a notice of trial without a jury and certificate of readiness. On March 23, 2003 "Windsor" objected to the notice of trial. The objection was dealt with by way of a telephone conference on Appearance Day, May 16, 2003. This resulted in an order that included, amongst other things, the following:

> IT IS FURTHER ORDERED that unless on or before June 30, 2003 the Defendant has filed and served documents in support of an Application requiring the Plaintiff or its officers to provide additional documents or further responses to undertakings given during discovery examinations that the Prothonotary forthwith shall assign the four days of trial requested by the Plaintiff in its Notice of Trial.

[8] On June 5, 2003, counsel for "Windsor" filed a notice to produce for inspection, seeking twelve items of disclosure. On June 20, 2003, "Windsor" filed this application to compel production of the items listed in the notice to produce.

ISSUE

What, if anything, listed in "Windsor's" notice to produce for inspection, should "Santec" be ordered to produce pursuant to Civil Procedure Rule 20.06(1)?

DISCUSSION

[9] The law in Nova Scotia is well-established and states quite clearly that the rules pertaining to discovery and the production of documents should be interpreted liberally. In the case of **Upham** v. **You** (1986), 73 N.S.R. (2d) 73, Matthews, JJ.A. stated at paragraph 26:

> [26] The Supreme Court of this Province has consistently held that the Rules relating to discovery of persons and the production of documents should be interpreted liberally to give effect to full disclosure. See for example, **Imperial Oil Ltd.** v. **Nova Scotia Light & Power Co. Ltd.** (1973), 41 D.L.R. (3d) 594; **Imperial Oil Ltd.** v. **Nova Scotia Light and Power Co. Ltd.** (1974), 10 N.S.R. (2d) 693, and on appeal at p. 679; **Swinamer** v. **Canadian General Insurance Company** (*supra*); **McCarthy** v. **Board of Governors of Acadia University** (1976), 22 N.S.R. (2d) 381; and **Schwartz** v. **Royal Insurance Company** (1978), 26 N.S.R. (2d) 223;
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> [27] Jones, J.A., said in **Central Mortgage & Housing Corporation** v. **Foundation Company of Canada Limited** (1982), 54 N.S.R. (2d) 43 at p. 49:
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> > "Coupled with the requirements under the Rules for complete disclosure and inspection of documents, interrogatories, admissions, notice of experts' reports, and pre-trial conferences, it is apparent that our Rules are designed to ensure the fullest possible disclosure of the facts and issues before trial and thereby avoid the element of surprise. Whereas the former Rules prevented pre-trial disclosure of evidence I think one can now say the opposite is true. The object is to avoid surprise, simplify the issues and, hopefully, discourage the need for continued litigation...."
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> And at p. 53:
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> > "The practice in this Province has been to interpret the Rules liberally. See the decision of Cowan, C.J.T.D. in **Davies** v. **Harrington** (1980), 39 N.S.R. (2d) 199; 71 A.P.R. 199."

Matthews, JJ.A. then went on to state further at page 81 commencing at paragraph 35 as follows:

> [35] Cowan, C.J.T.D., in **King** v. **King** (1975), 20 N.S.R. (2d) 260, had reason to consider Rule 18.09(1) in a maintenance action where the petitioner's solicitor put the discovery to an end on the ground that the questions were irrelevant. He said at p. 263:
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> > "The Nova Scotia rule with regard to examination for discovery is wider than similar rules in force in other Canadian jurisdictions. Rule 18.09(1) requires the person being examined to answer "any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings'."
>
> And further at p. 264:
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> > "It is apparent, therefore, that the test of relevancy having regard to the subject matter of the proceeding, gives a good deal of leeway to the respondent's solicitor on the examination for discovery."
>
> [36] The appellant argued that the request for the information here was simply a "fishing expedition". Such is not permitted in some other jurisdictions. However, within limits, a "fishing expedition" is permitted by virtue of Rule 18.12(2) (supra).
>
> [37] The appellant has placed the information requested in issue by his pleadings. Even if that were not so, the information requested, in my opinion, is relevant, at least at the discovery stage. The "answer sought appears reasonably calculated to lead to the discovery of admissible evidence" in the words of Rule 18.12(2). The ultimate question respecting relevancy of the information obtained and its admissibility must, of course, be decided at trial.

[10] With regard to Civil Procedure Rule 20, the decision of the Honourable Justice Robert W. Wright in **(A.G.)** v. **Royal & Sun Alliance Insurance Co. of Canada** (2000), 190 N.S.R. (2d) 208 states at paragraphs 10 and 11 of page 211:

> [10] It has been recognized by the Courts in this Province on numerous occasions that CPR 20 is to be liberally interpreted and that where full disclosure is the paramount rule, relevant documents must clearly be privileged before their production should be refused ...

> [11] It is also well-established that while the applicant must satisfy the relevancy test, the burden of establishing that the documents are privileged from production falls on the party seeking to withhold their production.

[11] Since most of the information now sought by "Windsor" is the result of undertakings provided at the discovery of Sandy Herrick, the President of "Santec", the question of relevance of the information requested must be considered. Counsel provided cases dealing with the meaning of relevance. I have already referred earlier to the decision of Justice Matthews in **Upham** v. **You**, *supra,* in which he stated at paragraph 37:

> [37] The appellant has placed the information requested in issue by his pleadings. Even if that were not so, the information requested, in my opinion, is relevant, at least at the discovery stage. The "answer sought appears reasonably calculated to lead to the discovery of admissible evidence" in the words of Rule 18.12(2). The ultimate question respecting relevancy of the information obtained and its admissibility must, of course, be decided at trial.

[12] Civil Procedure Rule 20.06(1) states:

> **Order for production of documents**
> 20.06 (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.

[13] It is apparent from the reading of this particular rule that it does not in any way limit the scope of information required to be produced by the parties provided it relates to a matter in question in the proceeding. In keeping with the previous

interpretation of the rules pertaining to discovery and disclosure once the applicant satisfies the requirement of relevancy the information, provided it is not privileged and assuming it is in the possession, custody or control of the opposing party, should be made available. This can be done while leaving the ultimate decision as to admissibility to the trial judge. The objective then is to enable all parties to an action to have knowledge of all relevant information prior to trial. This will result in, if not settlement, at least a clearer understanding of all facts relating to the dispute. This could narrow the issues resulting in a much more stream-lined trial. Civil Procedure Rule 1.03 states that:

> **Object of Rules**
> **1.03.** The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[14] Unfortunately, in this case, counsel for the two parties could not agree on what exactly had been requested and what had been provided. Short of reviewing all of the information already provided and comparing it to what is in the possession, custody or control of "Santec" there is no way of really knowing what should be provided. During the hearing it was acknowledged by counsel for "Windsor" that item number 7 in the notice to produce has been satisfied. In addition, counsel for "Santec" agreed

to provide the information that would satisfy items number 2 and 9. His undertaking was satisfactory to "Windsor's" counsel and nothing further need be said about this.

[15] In relation to item number 11, "Santec's" counsel stated that this information had already been provided. Counsel for "Windsor" did not dispute this and I therefore find that this requirement has been satisfied.

[16] In regards to the remaining eight items there still remains a dispute over whether or not the information requested either in the form of an undertaking or in correspondence from "Windsor's" counsel subsequent to discovery or in the notice to produce for inspection filed on June 5, 2003. While there might be some room to argue over the meaning and intent of each undertaking and whether or not they have been fulfilled in whole or in part, I do not believe it would be a worthwhile use of the court's time. Certainly, if counsel for one of the parties became aware, upon review of the discovery transcript, that he or she should have requested additional information as part of the undertaking or if he or she had neglected to ask certain questions that would have led to further undertakings surely counsel would not be precluded from seeking further information by way of written interrogatories or additional discoveries or, as in the case before me, by way of a notice to produce.

[17] I am satisfied that the additional information requested by counsel for "Windsor" is relevant and not privileged. Furthermore, the information is in the possession, custody or control of "Santec" and although it might be obtained by "Windsor" from other sources, not party to the action, it should be made available by "Santec".

[18] I therefore order that the entire tender submission requested in items 1, 3 and 6 be provided to counsel for "Windsor".

[19] I further order that all job minutes for the Beaverbank project referred to in item number 4 and additional information regarding employment records of those who worked on the Halifax Water Commission project referred to in item number 5 be provided. This should not include the complete personnel file on these individuals but rather only information disclosing:

(1) name;

(2) dated hired;

(3) position for which the individual was hired or type of work performed and the rate at which the individual was paid;

(4) date employment on that project ended;

(5) reason why employment ended.

[20] "Santec" should also provide full details of the Avonport and Indian Brook projects as well as any other projects in which it did not contract out the mechanical work. The information provided should be sufficient to allow "Windsor" to determine the profit margins on those jobs set out in item number 8 and the B.I.O. New Salt Water Supply System, Dartmouth project referred to in item number 12.

[21] Finally all information requested in item number 10 should be provided by "Santec" even though it might be available from other sources. It should not be necessary to force third parties who are not otherwise involved to provide information that is in the possession or control of one of the parties to the action.

[22] As stated earlier I do not think it should be necessary for the court to review each and every drawing, sketch, invoice, receipt or other scrap of paper that might have relevance to this proceeding. The court should not have to micro-manage a file to this extent. As to the information provided, its admissibility will be left to the trial judge to determine at the appropriate time.

COSTS:

[23] Costs should be in the cause.

J.