IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Crosby v. Higgins Construction Ltd., 2008 NSSC 98

Date: 20080401
Docket: SCP 267850/SP 283117
Registry: Pictou

Between:

John Crosby

Appellant

v.

Higgins Construction Limited

Respondent

DECISION

Judge: The Honourable Justice Douglas L. MacLellan

Heard: March 4th, 2008, in Pictou, Nova Scotia

Written Decision: April 1st, 2008

Counsel: Douglas A. Caldwell, QC, and Sarah M. Lennerton
for the appellant
Andrew D. Taillon, for the respondent

By the Court:

[1] This is an appeal from a decision of Adjudicator Ray O'Blenis of the Small Claims Court dated June 11th, 2007.

[2] The appellant John Crosby (hereafter referred to as "Crosby") was the respondent in a claim filed by Higgins Construction Limited (hereafter referred to as "Higgins") in which it claimed the sum of $25,000.00 from Crosby as a result of work done at the request of Crosby on premises owned by him located at 74 Stellarton Road, New Glasgow.

[3] When Higgins' claim was filed Crosby filed a counterclaim asking that the Small Claims Court determine that the work done by Higgins was unsatisfactory or deficient and/or not completed and that his claim of close to $50,000.00 be set off against the claim advanced by Higgins. Crosby agreed that his counterclaim be reduced to $25,000.00 to come within the limits of the jurisdiction of the Small Claims Court.

[4] The Small Claims Court heard the matter over four days in November 2006 and March 2007. Adjudicator O'Blenis filed his 28 page decision in June 2007.

[5] The Notice of Appeal filed by Crosby alleges error of law on the part of the Adjudicator and indicate:

> "The particulars of the error or failure which form the grounds of appeal are:
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> i) The Adjudicator erred at law by incorrectly finding civil liability against the Defendant in light of the Adjudicator's finding of fact that the mechanical and electrical components were not within the scope of the parties' contract;
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> ii) The Adjudicator erred at law by incorrectly finding civil liability against the Defendant in light of the Adjudicator's finding of fact that the Claimant informed the Defendant of the potential Building and Fire Code violations arising from the mechanical and electrical room, and the Defendant instructed the Claimant to proceed;
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> iii) In the alternative, the Adjudicator incorrectly assessed damages against the Defendant;
>
> iv) Any other grounds of appeal that become apparent following the filing of the Summary Findings of Law and Fact."

[6] Following the filing of the Notice of Appeal the Adjudicator filed a Summary of Findings dated October 4th, 2007.

[7] Both parties have filed pre-hearing briefs and I heard oral submissions from both counsel.

BACKGROUND

[8] In the spring of 2001 Crosby contacted Higgins to do work on his premises, the former Copper Kettle building on Stellarton Road in New Glasgow. It was a major job involving extensive work to the building.

[9] The parties discussed the work to be done and agreed that there would be three phases of work. Phase I involved demolition of the exterior of the premises and extensive other work to the building including concrete work and a new entrance to the basement and also work on the roof and on exterior doors and windows. The contracted price for that work was $62,700.00.

[10] Phase II of the contract is headed “MECHANICAL & ELECTRICAL” and indicates:

> “Any Subcontract Work supervised and under control of the General Contractor will be billed to the owner at invoiced cost plus a fee. Also to include any cutting

> and patching or other general work required for mechanical or electrical system installation."

[11] It was understood and agreed that the mechanical and electrical work would be subcontracted and that Higgins would be paid a flat fee of $3,344.00.

[12] Phase III of the project involved interior construction and the contract indicated:

> "To construct interior partitions on main floor to subdivide the floor into Area A, Area B plus common entrance area and washroom. To include partition framing, insulting, drywall ready for paint, doors (3) and sidelight windows (2), washroom vanity, grab bars. Assumed no ceilings."

The price for that work was $7,700.00.

[13] The Phase III work also initially involved a proposal to partition the basement area into rooms. However, that part of the contract was deleted by consent of both parties. The projected cost of that work if it had gone ahead was $9,925.00.

[14] The contract entered into between the parties had as a term the incorporation of contract terms and conditions as per a standard stipulated price contract (CCDC). That document which was attached to the written contract provided as follows:

> "10.2.2 The *Owner* shall obtain and pay for the building permit, permanent easements, and rights of servitude. The *Contractor* shall be responsible for permits, licenses, or certificates necessary for the performance of the *Work* which were in force at the date of bid closing.
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> 10.2.3 The *Contractor* shall give the required notices and comply with the laws, ordinances, rules, regulations, or codes which are or become in force during the performance of the *Work* and which relate to the *Work*, to the preservation of the public health, and to construction safety.
>
> 10.2.4 The *Contractor* shall not be responsible for verifying that the *Contract Documents* are in compliance with the applicable laws, ordinances, rules, regulations, or codes relating to the *Work*. If the *Contract Documents* are at variance therewith, or if, subsequent to the date of bid closing, changes are made to the applicable laws, ordinances, rules, regulations, or codes which require modification to the *Contract Documents*, the *Contractor* shall notify the *Consultant* in writing requesting direction immediately upon such variance or change becoming known. The *Consultant* will make the changes required to the *Contract Documents* as provided in GC 6.1 - CHANGES, GC 6.2 - CHANGE ORDER, and GC 6.3 - CHANGE DIRECTIVE.
>
> 10.2.5 If the *Contractor* fails to notify the *Consultant* in writing; and fails to obtain direction as required in paragraph 10.2.4; and performs work knowing it to be contrary to any laws, ordinances, rules, regulations, or codes; the *Contractor* shall be responsible for and shall correct the violations thereof; and shall bear the costs, expenses, and damages

> attributable to the failure to comply with the provisions of such laws, ordinances, rules, regulations, or codes."

[15] In his decision the Adjudicator dealt with a number of smaller items but the main issue in dispute between the parties was the fact that two subcontractors who were doing mechanical and electrical work installed the heat pump for the building and the electrical panel for the wiring in the building in the same room. After this work was done a Municipal Building Inspector checked the building and determined that this was a violation of the Fire Code. As a result of that discovery Crosby had to separate the mechanical from the electrical unit and incurred costs of over $20,000.00 to have that done. His position was that Higgins should have picked up on this problem as a result of its obligation under Phase II of the contract and asked that $25,000.00 be deducted from the money owing to Higgins for the other work. Crosby acknowledged at the hearing that the amount claimed by Higgins was appropriate for other work done but asked that his claim for remediation of the mechanical and electrical work be set off against the claim by Higgins.

[16] In his decision and in the Summary of Findings filed by the Adjudicator he rejected the appellant's argument that Higgins was responsible under the terms of

the contract to either construct two separate rooms on the premises for the location of the mechanical and electrical equipment or that he was responsible for ensuring that the two subcontractors followed the Building Code requirements.

[17] The Adjudicator found that the contract between the parties was set out in a document dated May 29th, 2001 (Exhibit 1).

STANDARD OF REVIEW

[18] In **Brett Motors Leasing Ltd. v. Welsford**, [1999] N.S.J. No. 466, Saunders J. (as he then was) commented on the situation where the Court deals with an appeal from a Small Claims ruling. He said at paragraph 14:

> "One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court

> has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration."

[19] Our Court has also dealt in a number of cases with situations where on appeal this Court should overturn findings of fact by an adjudicator.

[20] In **Nicholas v. MacIntyre**, [2004] N.S.J. No. 68, LeBlanc J. of this Court said after quoting from the **Brett Motors** case:

> "**25** I adopt the analysis of Saunders, J. in Brett, supra and find that before I can overturn the adjudicator's decision, there has to be a clear error on her part. In other words, the appellant must show that the adjudicator misinterpreted documents or other evidence, that there was no evidence to support the conclusions reached, that she clearly misapplied the evidence in a material respect thereby producing an unjust result or that she failed to apply appropriate legal principles to proven facts. Only in such an instance, could I overturn the decision of the adjudicator."

[21] In **Morris v. Cameron**, [2006] N.S.J. No. 19, LeBlanc J. once again dealt with the issue of the Court's power to overturn findings of fact by an adjudicator. He said:

> "**37** I do not accept the respondent's argument that the reviewing court can never review the findings of fact of the adjudicator. While this Court may not substitute its own findings for those of the adjudicator, the adjudicator's findings must be grounded upon the evidence. In order for the reasons to be sufficient, they must demonstrate the evidentiary foundations of the findings. This conclusion is supported by s. 34(4) of the Small Claims Court Act, which requires

> the adjudicator to submit to the reviewing court a summary of his findings of fact and law. Accordingly, the adjudicator has a duty to submit not only the decision, but also the basis of any findings raised in the Notice of Appeal. The adjudicator thus has two opportunities - the decision and the summary report - to clearly state the basis for any findings of fact."

[22] Our Court of Appeal in **Davison v. Nova Scotia Government Employees Union**, [2005] N.S.J. No. 110, put the standard of review in this type of appeal as follows:

> "**61** Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: Housen v. Nikolaisen, [2002] 2 S.C.R. 235 per Iacobucci and Major, JJ. at paras. 10 and 23 to 25.
>
> **62** The 'palpable and overriding error' standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: see Housen v. Nikolaisen, supra, at paras. 1 to 5 and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but 'overriding and determinative.'"

[23] The main argument advanced by the appellant at the hearing of this matter was that the Adjudicator erred when he held that Higgins was not a general contractor on the work being done on the Crosby premises and therefore was not

responsible to know that having the mechanical and electrical components in the same room was a violation of the fire regulations.

[24] It is submitted that if Higgins was being paid to supervise the work being done by the mechanical and electrical subcontractors, it should have ensured that the subcontractors did not put the two components in the same room.

[25] In his decision the Adjudicator found that essentially what happened was that Crosby provided specifications obtained from Thompson Engineering Limited for the mechanical work (installation of a heat pump) and electrical work and that Higgins then obtained quotes for this work from two different companies. Higgins submitted these quotes to Crosby who then picked the appropriate contractor to do the work. When that was done, however, it was never made clear in the specifications for each job that the heat pump and the electrical panel could not be in the same room. Both subcontractors did their work as specified in the drawings and installed a heat pump and the electrical panel in the same room in the basement of the premises.

[26] The Adjudicator found that Higgins was not required under the contract to do the mechanical work. He found that Crosby was relying on Thompson Engineering Consultants Limited to set out what type of mechanical and electrical work to install in the building and that he (Crosby) prepared a sketch of the floor plan where the mechanical and electrical components should be located which he then provided to Higgins.

[27] The argument by the appellant here is that Higgins should have picked up the problem with the location of the heat pump in relation to the electrical panel.

[28] The major portion of the appellant's counterclaim is for work involved in separating the heat pump from the electrical panel.

WAS HIGGINS THE GENERAL CONTRACTOR?

[29] I have reviewed the Adjudicator's decision and his Summary of Findings. He concluded that Higgins was not a general contractor on the project but that Crosby himself was the general contractor and therefore he (Crosby) should have

known or sought advice about the location of the heat pump in relation to the electrical panel.

[30] The Court does not have a transcript of the evidence presented before the Adjudicator, however, it appears clear that the issue of whether Higgins was a general contractor was argued before the Adjudicator. Crosby had experienced counsel acting for him at the hearing and a central argument before the Court was which party should have picked up the problem with the location of the two units prior to the inspector's report.

[31] The Adjudicator found that, while Higgins sought out quotes for the mechanical and electrical work, it was Crosby who decided to accept the quotation or not. It was Crosby who paid the subcontractors. The development permit was issued to Crosby himself. He found that Higgins did not breach his obligations under Condition 10.2.5 of the CCDC contract.

[32] I conclude using the test described by Saunders J. in the **Brett Motors** case and LeBlanc J. in the two cases mentioned above and the test as set out by the Court of Appeal in **Davison** that the Adjudicator here knew the issue before him

and his finding that Crosby was the general contractor for the job was reasonable. He made no palpable or overriding error in his interpretation of the facts which would justify me overruling his decision.

[33] I would not disturb his finding on the issue of which party was the general contractor.

[34] The appellants argue that Higgins should have known about the location problem in regard to the heat pump and the electrical panel. That is based essentially on the suggestion that as a general contractor it would be responsible to ensure that the Fire Code was followed.

[35] The CCDC documents by Condition 10.2.5 makes the contractor responsible if he does work in contravention of Building or Fire Codes. I conclude that would apply here to any work actually done by Higgins. However, the work under Phase II was not done by Higgins. It was done by subcontractors engaged and paid for by Crosby. That work was to be supervised by Higgins but I conclude such supervision would not include making sure that the work done complied with various codes as was found by the Adjudicator.

[36] I note that here no civil action has been taken by Crosby against either Thompson Engineering or either of the two subcontractors. The plans prepared by Thompson Engineering did not specify that the two units could not be in the same room.

[37] It is also surprising that the subcontractors at some point would not be aware of the potential code violations of having the heat pump and the electrical panel in the same room.

[38] I would dismiss the appeal and confirm the orders made by the Adjudicator.

J.