Claim No: 284377

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: L.A. Oakes Resource Systems Inc. v. Metex Corporation Ltd., 2007 NSSM 71

BETWEEN:

L.A. OAKES RESOURCE SYSTEMS INCORPORATED

Claimant
Defendant by Counterclaim

- and -

METEX CORPORATION LIMITED

Defendant,
Claimant by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 25, 2007

Decision rendered on October 4, 2007.

REVISED DECISION: This decision was issued previously under an incorrect neutral citation number - 2007 NSSM 65. This decision replaces the previously issued decision.

APPEARANCES

For the Claimant: James D. MacNeil, Counsel

For the Defendant: Moneesha Sinha, Counsel
Justin Adams, Articling Clerk

BY THE COURT:

[1] This is a Claim and Counterclaim arising from the supply of some sophisticated equipment used in the process of chlorinating water.

[2] The Claimant is a Halifax-based contractor who was performing work in connection with chlorination systems being installed by a small Nova Scotia municipality and a large food processor in New Brunswick. The Defendant is the Toronto-based manufacturer and supplier of a particular piece of computerized equipment that controls the amount of chemical introduced into the water-stream.

Preliminary Issue

[3] The total amount claimed by the Claimant is $22,504.51 in damages. The Counterclaim seeks $4,507.58 as allegedly owing. The claim was issued on August 13, 2007, and the Defence and Counterclaim was filed on August 24, 2007. I mention this at the outset of my decision because of an issue that was raised at the commencement of the trial. The Defendant, which is based in Toronto, did not send any of its potential witnesses to Nova Scotia for the trial. Instead, counsel prepared and sought leave to file two affidavits to serve as her client's evidence.

[4] Counsel for the Claimant objected to the introduction of the affidavits, which he had not yet seen. I invited him to review them and indicate whether there was anything therein that was not contentious, such as to require cross-examination, and which might be of assistance to the Court. After reviewing the affidavits, he maintained his objection. I ruled at the trial that I would not look at nor admit the affidavits.

[5] I wish to expand upon my reasons here.

[6] The *Small Claims Court Act* sets out the powers of an Adjudicator to admit evidence:

> **Evidence**
>
> 28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing that
>
> (a) would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) is inadmissible by any statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

[7] I believe it is fair to say that the general intent of these provisions is not to overburden the Court and its litigants, many of whom are unrepresented, with the technical rules of evidence that apply to one extent or another in the higher courts. However, this does not mean that anything goes in the Small Claims Court.

[8] The issue of receiving affidavits in lieu of hearing from live witnesses was considered in an appeal before Justice Murphy of the Nova Scotia Supreme Court in *Malloy v. Atton* (2004) 225 N.S.R. (2d) 201. In the case under appeal the Adjudicator had received affidavits, with no opportunity for cross-examination provided to the opposite party. In allowing the appeal and overturning the decision, the Learned Justice said:

> 13 I interpret [the Small Claims Court Act] as giving an Adjudicator the discretion to admit or exclude affidavit evidence, provided there is compliance with the rules of natural justice.
>
> 14 The Nova Scotia Civil Procedure Rules, although not directly applicable in Small Claims Court, may be consulted for guidance in the absence of an applicable Small Claims Court rule. Civil Procedure Rule 38.10 provides that the deponent of an affidavit to be used at trial may be examined, cross examined, and re-examined. Rule 31.04 provides as follows:
>
> > 31.04 (1) The court may by order permit,
> >
> > (a) any fact to be proved by affidavit;
> >
> > (b) the affidavit of any witness to be read at a trial; and
> >
> > unless the court otherwise orders, the deponent shall not be subject to cross-examination and need not attend the trial.
> >
> > (2) An order under paragraph (1) may be made on such terms as to filing and service of the affidavit and to the

> production of the deponent for cross-examination as the court thinks just.
>
> 15 I interpret that Rule as allowing the Court to receive affidavits when a timely request is made, so that the Court can by order establish terms with respect to filing, service, and cross examination sufficiently far in advance of the hearing to allow an opposing party to develop a response to the affidavit evidence.
>
> 16 The right to cross examine is a fundamental part of the trial process. It is a basic procedure in our court trial system that each party has the right to cross examine persons whose testimony is introduced. There will be situations where affidavit evidence will be accepted without cross examination, such as where the affidavit has been provided to the opposing party in advance and the affiant is not requested to attend, where the evidence is not disputed or does not address a crucial issue, or, as contemplated by Rule 31.04 where the Court makes an order. In my view no such circumstances arose in this case, where the affidavit was first provided late in the hearing, where a request to cross examine was rejected, and the evidence was sufficiently cogent to be referenced in the Adjudicator's decision.

[9] The same reasoning applies here, with even greater force because of the magnitude of the case. The claim in *Malloy* was for a total of $812.00. The claim here seeks damages very close to the $25,000.00 maximum allowed in this Court. Up until very recently in Nova Scotia, and still in many Provinces, cases of this size are heard in Superior courts with all of the procedural protections and evidentiary rules. To relax such a fundamental rule of natural justice as the right to cross-examine witnesses in a case of this size would, in my opinion, be a gross failure to provide natural justice to the Claimant.

[10] I do appreciate that the Defendant is based in Ontario and there is considerable cost associated with travelling to Nova Scotia. There was some vague reference at trial to unexpected circumstances making the trip

impossible for the principal of the Defendant. However, there was no request for an adjournment; indeed, counsel for the Defendant stated that she was not seeking an adjournment because the principal of the Defendant wanted the matter finally dealt with.

[11] Unfortunately, the consequence of that position is that essentially **no evidence** was offered by the Defendant - other than what little counsel was able to glean from her cross-examination of the principal of the Claimant or from his documents - to support the Defence or the Counterclaim.

[12] In the result, I heard only one side of the story and the decision will reflect that fact.

The Facts

[13] Lawrence Oakes in the owner of the Claimant company. He has been in the water purification and related businesses since 1970. His business is to supply and install entire systems or components that he obtains from manufacturers such as the Defendant.

[14] The facts giving rise to this claim began when the Claimant was contracted to assist with a new water chlorination system for the domestic water supply for the Municipality of East Hants, Nova Scotia. A set of specs for the system was sent to a number of potential suppliers, including the Defendant. This included a section 2.2.3 which specified that the Process Control Unit (PCU) should be *"microprocessor based and capable of accepting a 4-20 mA signal proportional to flow, and a 4-20 mA signal proportional to measured residual."* In lay terms, as I understand it, this

means that the device would be a small computer controlling the flow of sodium hypochlorite, in response to analog electrical signals in the 4 to 20 milliamp range, from sensors detecting both the flow of water through the system and the measured amount of sodium hypochlorite in the output stream. Depending on the measurements of flow and residual concentration, the pump would either supply more or less sodium hypochlorite and thus achieve a rough balance within desired tolerances.

[15] The Defendant responded to the invitation to quote, offering its "AutoPrime" unit at a price of $7,250 plus tax. This is a unit that the Defendant company had designed and manufactured itself. The Claimant liked what he saw and ordered one for East Hants.

[16] While the East Hants system was being constructed and before the AutoPrime was in a position to be tested, the Claimant was hired to install a chlorination system at a McCain's food processing plant in Florenceville, New Brunswick. A second AutoPrime was ordered and delivered.

[17] Problems arose with both AutoPrime units. In East Hants, the most significant problem was that the unit had the capability of responding to flow but not to residual. Thus it could only do half of what it was intended to do. In a domestic water supply it is critical that the system stop pumping chlorine when the levels reach a certain point in order to keep the levels within a narrow tolerance.

[18] This problem necessitated significant technical support from the Defendant, which from the Claimant's point of view was not forthcoming. One reason for the slow or inadequate response was that the designer of the

AutoPrime unit, Bill Soutar, shortly thereafter left the Defendant's employ and had to be personally contracted to assist with the reprogramming. The other issue appeared to be that the Defendant was unwilling to supply programming information, citing intellectual property issues, which programming information would have allowed the Claimant to deal with some of the internal issues more expeditiously.

[19] Another problem with both units was less technical but just as serious, if not more so. The AutoPrime unit has to be connected to the reservoir of sodium hypochlorite in order to control its release, just as a heart is connected to the blood system by arteries and valves. According to the Claimant, the standard practice for pumps involving caustic chemicals such as sodium hypochlorite is for the tubes to be welded into place rather than threaded and screwed. The latter creates a potential for leaks, which in turn create problems as the caustic chemical can damage the equipment. The evidence of the Claimant was that the AutoPrime came with threaded fittings that leaked and caused significant difficulties for the engineers in both locations. In fact, there was evidence to the effect that East Hants may be looking to scrap the AutoPrime altogether because of the inability to resolve all of the leaks.

[20] The AutoPrime unit for McCains had a different but equally serious electronic problem.

[21] The system at McCain's was necessary to chlorinate well water used in food processing, which normally had not required chlorination until a change in government regulation made it mandatory. The range of chlorine in the water was not as critical because the water was not being

consumed *per se*, and so the system did not require the capacity to respond to residual levels. It only had to respond to flow.

[22] The McCain's engineers were responsible for supplying and installing the flow sensors. When the AutoPrime was finally installed and tested, the electrical signal from the flow sensors was erratic, although at all times within the 4 to 20 milliamp range. The AutoPrime - despite being rated to respond to 4 to 20 milliamp signals, could not handle the wild fluctuations and did not function. McCain's was not willing to change its flow sensors. Numerous efforts were made to try to remedy the problem, without much cooperation from the Defendant (according to the Claimant) and consequently without much success. An eventual solution was found, which was simply to wire the AutoPrime to turn on or shut off when the pump was on or off. This was described in the hearing as a so-called "digital signal," a term quite misleading if it is presumed to be more sophisticated than the analog (i.e. variable) signal to which the unit was designed to respond. It was no more sophisticated fundamentally than an on-off light switch. In the result, the sophisticated capability of the AutoPrime to regulate chemical release according to measured water flow was essentially bypassed and left unused.

[23] On the available evidence I am satisfied that the Defendant supplied goods that did not match the specifications provided and did not function properly. I also find that the Defendant failed reasonably to back up its product with customer service. These were sophisticated pieces of electronic equipment that were intended for very specific purposes and they did not perform as required, which ought to have galvanized the Defendant to action to back up its product. I do not mean to suggest that the Defendant

did nothing to support its product, but the available evidence satisfied me that the response was slow and not entirely responsive, with the result that the Claimant had to spend a great deal of time and money trying to get the equipment to work.

[24] I find that the Defendant was in breach of contract and the Claimant suffered damages as a consequence. Those damages consisted both of actual out of pocket expenses as well as the time and expenses of making numerous additional trips to New Brunswick to deal with the difficulties caused by the faulty equipment.

[25] I must now assess those damages.

Damages

[26] The damages claimed are $3,180.79 in connection with the East Hants project and $19,323.72 in connection with McCain's.

[27] The East Hants claim was not broken down precisely at trial. I have before me invoices for $850.91 from Acrotech and $247.38 from Omnitech. There was nothing in addition filed. There was some mention of it including $1,056.00 for Bill Soutar's services, but that amount was actually added to the McCain's bill. There was also some mention of additional time and trouble, but no quantification was provided. Without some supporting evidence or at least a rationale I am not prepared to assess additional damages for this branch of the case. I assess the damages for the East Hants project at $1,098.29.

[28] The McCain's claim is broken down in an invoice which the Claimant issued to the Defendant on September 18, 2006. It consists of:

Item	Description	Qty	Unit price	Amount
Labour	13 days @ 10 hrs/day	130	$75.00	$9,750.00
Mileage	6 trips @ 1180 kn/trip	7080	$0.50	$3,540.00
Hotel	7 nights	7	$122.11	$854.77
Meals	13 days @ $100/day	13	$100.00	$1,300.00
Materials	fittings, tubing etc	449.86	1	$449.86
Labour	Bill Soutar PLC & programming	1056	1	$1,056.00
HST				$2,373.09
				$19,323.72

[29] As I understood the evidence, Mr. Oakes, usually accompanied by his daughter who works for him, had to travel to New Brunswick on these seven separate occasions simply to deal with the fallout from the improperly functioning AutoPrime unit. I am asked to accept these charges as reasonable. On their face, there is nothing inherently unreasonable about the rates charged. Clearly the Claimant was put to significant trouble and expense and in light of my finding should not have to bear the cost. I am prepared to accept this claim as submitted, observing once again that there was little if anything offered to rebut it.

Counterclaim

[30] The Defendant filed a Counterclaim for what it alleges were unpaid invoices. No evidence was tendered in support of the Counterclaim.

Counsel for the Defendant did not introduce the invoices as evidence, even on cross-examination of Mr. Oakes. She did not seek to admit them as business documents or on any other basis.

[31] While I can easily imagine that there may have been invoices which the Defendant was submitting and which the Claimant might have been unwilling to pay, because of all of the problems, I must take cognizance of the fact that the Claimant (Defendant to Counterclaim) denies that there is anything owing and there is simply no evidence before me of any debt from the Claimant to the Defendant which, if proved, might at least have been an offset against the damages allowed.

[32] As such I have no choice but to dismiss the Counterclaim.

[33] There will accordingly be judgment for $20,422.01. I will also allow costs of $170.88 for filing the claim. No service costs were proved. Although prejudgment interest is claimed, in my discretion, under all of the circumstances, I am not prepared to award any interest.

[34] The total judgment will therefore be for $20,592.89.

Eric K. Slone, Adjudicator