

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: EDM Holdings Ltd. v. Stearman Construction Management Inc.,
2011 NSSM 40

2011

Claim No. 325498

BETWEEN:

Name: **EDM HOLDINGS LIMITED**

Claimant

- and -

Name: **EDM ENVIRONMENTAL DESIGN AND MANAGEMENT LIMITED**

Claimant

- and -

Name: **STEARMAN CONSTRUCTION MANAGEMENT INC.**

Defendant

Hearing Dates: May 11, 12, and 17, 2011

Appearances: Claimant - Rebecca Hiltz Leblanc, Barrister and Solicitor
Defendant - Dianna Rievaj, Barrister and Solicitor

DECISION and ORDER

[1] In this case the Claimant seeks \$3,500 and the delivery of time and expense records - in effect, a detailed accounting. The Defendant defends and counterclaims for \$22,345.79. Given the relative size of the counterclaim and with

the parties' concurrence, I directed that the Defendant proceed first, as if it were the principal claimant.

- [2] At issue here is a construction contract and, as stated by counsel for the Defendant in her pre-hearing brief, whether the Defendant has overcharged the Claimant, EDM Holdings Limited, in respect of renovation work performed at EDM's premises at 2085 Maitland Street, Halifax.
- [3] The Claimant (Defendant by Counterclaim), EDM Holdings Limited, owns the subject land and buildings and was the contracting party. I shall refer to it as "EDM". EDM Environmental Design and Management Limited, the other Claimant, is a related company but had no involvement in the matters at issue here and will not be party to any final order I issue here.
- [4] I shall refer to the Defendant (Claimant by Counterclaim) simply as "Stearman".

Parties' Positions

- [5] Stearman's position, simply put, is that this was a "cost-plus" contract and, while the invoicing may have been less than ideal, when one strips all of that away, the labour and materials charges for which it has billed, are all supported by the back-up material. That analysis, as summarized in Tab 1 of Exhibit 4, shows \$22,345.79 outstanding, which together with pre-judgment interest comprises its claim. I note that this amount contains an invoice not originally submitted and I allowed its inclusion by way of amendment to the counterclaim.
- [6] EDM, while not seriously challenging that the contract was "cost plus", submits firstly, that Stearman's has failed to meet the legal standard of clearly showing what it is owed under a cost plus contract, a requirement laid out in what is described as the leading case of *G.T. Parmenter Construction Ltd. v. Sanders*, [1947] O.W.N. 539 (Ont. H.C.). It further argues that there are many elements to

the amount which are excessive, not attributable to the subject contract, and go beyond the terms of the agreement. It also notes and refers to case law that suggests that even with a cost-plus, or time and expense contract, cost estimates cannot be ignored.

Testimony and Documentary Evidence

- [7] The evidence in this matter was heard over two lengthy hearing nights. Submissions were heard on the third night. Evidence was given by Kermit Phillips, principal of Stearman; Mark Hoadley, project manager of Stearman; Andrea Hencher, former executive assistant to Margot Young; Margot Young, principal of EDM; and Steve Cumming, external accountant of EDM. As well, there were a number of exhibits tendered.
- [8] I will not review the evidence in detail at this stage but will, as appropriate, refer to such as it arises in my analysis.

Analysis

- [9] As I have alluded to, the construction contract here is said to be on a “cost-plus” basis or, what is also referred to as a “time and expenses” contract. In this context, the term “contract”, refers not to just a written document, but to the overall legal relationship between the parties which the law conceptualizes as a one of contract. The issue then becomes what are the terms of that contract and in doing that, the decided cases instruct us to look to, variously, written documents (if any) passing between the parties, verbal discussions between the parties, established practice of the parties, surrounding circumstances, industry practice, and perhaps court decisions of similar situations, to name some of the more common sources.
- [10] The main document(s) here are the two proposals dated June 1, 2009, and entitled Proposal #09-906L and Proposal #09-906T. These were prepared by Mark Hoadley on behalf of Stearman and agreed to by Margot Young on behalf of EDM. These documents do not use the terms “cost-plus” or “time and expense”, although it might be argued that the use of the term ‘Budget’ throughout infers

that. Nevertheless, I do find that on the basis of all the evidence here, there was no doubt that the billing was to be done on a cost-plus basis. Certainly that was the position of Stearman. As well, I understood that to be EDM's position although they take a different view of what impact, if any, the budget figures should have. I will return to that issue.

[11] I don't think there is any serious issue as to what is meant, in general terms at least, with the phrase "cost plus".

[12] *Black's Law Dictionary* (5th) defines "cost-plus" as follows:

"Cost-plus contract: *One which fixes the amount to be paid the contractor on a basis, generally, of a cost of the material and labour, plus an agreed percentage thereof as profits. Such contracts are used when cost of production or construction are unknown or difficult to ascertain in advance."*

[13] Goldsmith on *Canadian Building Contracts* 4th ed. contains the following definition of cost-plus contract:

"A cost-plus contract is one in which the owner agrees to pay to the contractor his actual direct cost of doing the work plus a stipulated percentage for overhead and profit"

[14] In my view, the correct approach is to consider the direct costs of the project, and then apply the stipulated percentage for overhead and profit. The evidence confirms that the percentage was 15%.

[15] The issues that arise are whether a number of the claimed-for expenses are direct costs of this project. A significant issue also arises as to whether the 15% is to be added to the quoted labour costs or whether the quoted rates already included a mark-up for profit and overhead.

[16] Both parties have referred to the ***Parmenter*** case which contains the following in respect of the onus on a contractor in a cost-plus case, (para 10):

Before dealing with the evidence I think it would be helpful to state the position of contractor who seeks payment for material supplied and for work done under a cost-plus contract. The contractor in such cases is in a favourable position. In undertaking the work he takes no risk of incurring any loss. He is assured payment of his costs and fee and is not under the anxiety of watching every item of expense closely in order to keep within the limit of his estimate, which he has to do when he is building for a firm price. **However, the responsibility he cannot escape is that he must keep proper accounts. This is a duty which the law imposes upon all persons in such a position that external parties have a legal interest in the payroll and records of materials used.** Furthermore, in this case there is a definite contractual obligation to keep proper accounts: see art. 16 referred to above. The onus is of course upon the plaintiff to prove his claim by a preponderance of evidence. **In a case where a contractor is seeking to recover on a cost-plus basis this burden is a particularly heavy one. He prima facie satisfied this onus by filing an itemized statement of his account, by producing his books and records to support his account, by showing that he kept an account of the materials used, and the cost thereof supported by invoices, by producing receipts for labour, services and sub-contracts and by swearing to the accuracy of all these things.** It is then for the defendant or person who has the liberty to surcharge and falsify the account to adduce evidence to show that the amounts claimed or the accounts are incorrect or unreliable. This burden is a very definite one: *Pit v. Cholmondeley (1754)*, 2 Ves. Sr. 565. But when once doubt is cast upon the accounts the onus shifts back to the contractor, so that if he fails to satisfy the Court that his accounts are accurate and support his claim, or if the Court is left in doubt, he fails. **It is not necessary that the accounts should be kept in any particular manner. It is sufficient if they are kept in such a way that they constitute proof of the contractor's charges. The records of the time of the workmen employed on the particular job in question must be provided strictly, since after the work is done there is no manner in which it can be checked.** However, so far as materials are concerned, so long as the building is in existence and the system of recording material is capable of giving a substantially accurate result, the Court may find that the plaintiff has proved his claim upon evidence somewhat less conclusive, unless the defendants adduce evidence which casts doubt on the plaintiff's method of recording material used, in which case strict proof may be required.

[Emphasis added]

[17] Counsel for EDM submits that Stearman does not meet the onus of *Parmenter* and for that reason alone, its claim should be dismissed.

[18] I agree that the manner in which the billing was done, coupled with the manner in which the back-up has been provided, is not clear cut. To paraphrase at least one of the EDM witnesses, the numbers simply didn't add up. I do think that Stearman should be able to provide to its customer a transparent, intelligible, and readily understandable accounting, with back-up, of the charges it has imposed. After all, to repeat part of the above quote *from Parmenter* :

*The contractor in such cases is in a favourable position. In undertaking the work he takes no risk of incurring any loss. He is assured payment of his costs and fee and is not under the anxiety of watching every item of expense closely in order to keep within the limit of his estimate, which he has to do when he is building for a firm price. **However, the responsibility he cannot escape is that he must keep proper accounts. This is a duty which the law imposes upon all persons in such a position that external parties have a legal interest in the payroll and records of materials used.***

[Emphasis added]

[19] Despite counsel's submissions, I do not agree that the Stearman claim should be dismissed solely for the reason of not providing clear and intelligible backup to the invoices. However, I do find that Stearman has not ultimately satisfied its onus and the amount claimed should be adjusted. I will deal with this under the headings of third party expenses and labour rates. Also, I will comment under the heading of price cap.

Expenses

- [20] As noted by the quoted definitions, a “cost-plus” contract is one in which the “owner agrees to pay to the contractor his actual direct cost of doing the work plus a stipulated percentage for overhead and profit”. Of critical importance here is that in order to be a proper and allowable cost, it must be directly related to the project in question.
- [21] The appropriateness of the gas charges was raised by EDM. In effect, they challenge whether the gas charges were related to the project in question. It is a fair question. In response, Stearman responded that they do not charge mileage and where they happen to gas up is their decision. While, I can accept that as far as it goes, the charges must still be related to the project. The inference I drew from the evidence was that the workmen, simply filled their tanks when required, and these charges were then posted to the EDM project.
- [22] With respect, that is not sufficient. Unless there was some specific agreement (which there was not), EDM has not by agreeing to a cost-plus contract, agreed to pay for all the gas used by the workmen that work on that project. The inference I draw is that is what was being billed to EDM. For example, I refer specifically to the gas receipts with the name “Wayne” on them.
- [23] What is required by the *Parmenter* case is some proof that the expense in question is directly related to the project. No such proof was given. There were suggestions that the workers may have had to go to various places to get materials but no actual, specific proof of that.
- [24] The following represents all of the gas receipts that form part of the third party charges:

DATE	ITEM	AMOUNT	PAGE
May 25-09	Gas	\$41.56	H43

Jun 11-09	Gas	\$87.99	H44
Jun 19, 09	Gas	\$76.23	H46
Jun 19-09	Gas	\$46.01	H47
Jun 26-09	Gas	\$82.75	H48
June 25-09	Gas	\$61.63	H49
Jul 5-09	Gas	\$48.01	H50
Jul 9-09	Gas	\$56.71	H51
Jul 11-09	Gas	\$49.10	H52
July 18-09	Gas	\$40.02	H53
July 15-09	Gas	\$74.09	H54
July 22-09	Gas	\$75.29	H55
July 23-09	Gas	\$65.49	H57
Jul 26-09	Gas	\$37.28	H58
July 2-09	Gas	\$73.35	H60
Aug 2-09	Gas	\$74.91	H61
	and		
	carwash		
Aug 5-09	Gas	\$56.21	H62
Aug 12-09	Gas	\$84.07	H63
Subtotal-gas		\$1,130.70	

[25] There was some general evidence indicating that Stearman workers did frequently drive to pick up materials, Kent being mentioned as typical destination for such trips. In the absence of evidence showing that it would have been more economical to have Kent deliver the product and assuming it was needed on a time sensitive basis, I would find that some gas expense should be allowed. I allow 25% of what has been claimed. In other words, I will disallow, 75% of what has been claimed. The calculation would therefore be $\$1,130.70 \times 75\% \times 1.15 = \975.23 , which will deducted.

[26] It is also asserted on behalf of EDM that it has been charged inappropriately for a number of items which were not provided to the subject project but were charged to EDM - painting, excess doors and hinges, extra door handles, material delivered to Artillery Place, concrete, MDF, and locksets. It is said by counsel for EDM that the amount in respect of these items is \$2,115. including the 15%

markup but not HST. No itemized list was provided to me and, through my own analysis I have been unable to reconcile the figure suggested by counsel of \$2115. The figure I arrive at is considerably less.

[27] I will allow a deduction of \$1,000 in respect of these items.

Labour Rates

[28] I turn then to the issue of the labour rates. This issue is of some significance as it accounts for a significant portion of the billed amounts.

[29] The accounting reconciliation at Tab 1 of Exhibit 4 uses three rates:

- Labour 1 - \$88.00 per hour
- Labour 2 - \$63.25 per hour
- Labour 3 - \$51.75 per hour

[30] These rates diverge from Ms. Young's evidence. She testified that Mr. Hoadley told her the rates would be the following:

- Project manager - \$80 per hour
- Specialized - \$50 - 60 per hour
- Laborer - \$35 - 45 per hour

[31] Ms. Young's evidence referred to and relied on the notes she had made on her copy of Proposal #09-906L, at the time of her meeting with Mr. Hoadley (Exhibit C12).

- [32] In Mr. Hoadley's evidence he stated that he told Ms. Young what the rates were to be. He did not however, in his evidence, indicate that actual figures. I inferred he meant the rates in Tab 1 of Exhibit 4.
- [33] There was some suggestion that he had testified that the labour rates were subject to a 15% markup. My bench notes indicate otherwise.
- [34] As well, it seems to me that if that was the case, it would have amounted to two mark-ups since it was clear in the evidence that the rates told to Ms. Young already had some element of mark-up. To put that another way, in no version of the evidence was it suggested that the rates quoted to Ms. Young were the actual rates paid to the workers. So while the parties may disagree as to what rates were actually quoted it is beyond dispute that what was quoted already had a markup. It may have been 15% or it may have been some other percentage. What percentage, we were not told and it cannot be determined because there was no evidence of what the workers were actually paid. Mr. Hoadley did make it clear in his cross-examination (with an analogy to law firm rates) that the figures he told Ms. Young were not the amounts that the workers themselves actually were paid.
- [35] I find that the rates quoted to Ms. Young were those confirmed by her notes entered in Exhibit 12. I further find that those rates already had a built in markup and, therefore, would not on any objective basis be subject to a further 15% markup.
- [36] I also note that the figures in Exhibit 14, a document produced by Stearman's own accounting system, shows total hours of 853.5 for 09-906, and net cost and gross cost of \$36,754.39 and \$32,452.37 respectively. The 853.5 is confirmed in the Stearman spreadsheet at Tab 1, Exhibit 4. And, when the figures are worked backwards it shows hourly rates (which would produce a blended rate for all the workers) of approximately \$43 and \$38 for the two figures. These figures are therefore confirmatory of the rates told to Ms. Young.

[37] Therefore, on the basis of the preceding, my conclusion is that the rates in Tab 1, Exhibit 4, are overstated. The spreadsheet needs to be reworked.

[38] For the purposes of re-calculation the spreadsheet, I would adopt the mid-point of the rates quoted to Ms. Young and use the \$80 for project manager, thus, as follows:

- Labour 1 - \$80.00 per hour
- Labour 2 - \$55.00 per hour
- Labour 3 - \$40.00 per hour

[39] I accept the figures for the number of hours shown in Tab 1, Exhibit 4. These figures appear to be consistent in all of the paperwork, specifically, Exhibit 14 in respect of job docket number 09-906. As well, there was support through Ms. Hencher's evidence, at least in general terms.

[40] I note that in each case, the claimed for labour hours are supported by the job cost dockets. It would have been preferable if we were shown the actual time sheets; but given today's computerized accounting systems (which were not present in 1947 when *Parmenter* was decided) and Mr. Phillip's evidence that the time charges were input by him on a daily or near-daily basis, I find that they have been proven satisfactorily proven and I do accept the figures.

[41] The revised spread sheet calculation for labour is therefore as follows:

	Labour -1 \$80 per hour	Labour -2 \$55 per hour	Labour -3 \$40 per hour	TOTAL
Total Project Hours by Labourer	26.25	135.9	902.1	

Total Project Cost by Labourer	\$2,100.00	\$7,474.50	\$36,084.00	\$45,658.50
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[42] This total figure of \$45,658.50 is, therefore, to be used in place of the \$57,589.35 figure used in Stearman's spreadsheet.

Price Cap

[43] Counsel for EDM has referred me to the case of *Topsiders Construction Ltd. v. Nielsen* (1997), 38 O.T.C. 273 (Ont. Ct. of Justice-Gen Div) where the court found that an estimate is a type of a price cap and applied a "leeway factor" 15%. This decision is owed great deference.

[44] The difficulty I have however is, it was not made clear to me how much of the billed-for work here was outside the original scope. The evidence on this at the end of the day was not clear. Therefore, I am not prepared to make any adjustment on account of this.

Adjusted Amount

[45] Applying the above, it will be seen the figures are to be adjusted by three amounts items - 1) a deduction of 975.23 in respect of gas expense; 2) a deduction of \$1,000 in respect of other expenses; and, a figure of \$45,658.50 in place of the \$57,589.35 labour figure.

[46] The following calculation applies these adjustments:

SUMMARY	As per Stearman	After Adjustment
Total Labour	\$57,589.35	\$45,658.50
Total	\$51,578.07	
Materials		
less	\$975.23	
less	\$1,000.00	
	\$49,602.84	\$49,602.84
Total		\$95,261.34
HST at 13%		\$12,383.97
Total with HST		\$107,645.31
Less amount paid		\$100,211.10
Amount owing		\$7,434.21

Warranty Papers

[47] EDM seeks delivery of the warranty paperwork in respect of the HVAC and toilet/pump. I understood that Stearman was not contesting this.

Order

[48] Subject to the comments in this section, my order will be for the payment of \$7,434.21 from EDM Holdings Limited to Stearman and the deliver of the warranty

paperwork from Stearman to EDM Holdings. Given, the mixed result, there will be no costs for either party. As well, there will be no prejudgment interest.

[49] This case, by its nature, required me to engage in adjusting several sets of figures through spread sheets and otherwise. The basis for doing so was based on my findings as to the facts and applicable principles and there will be no further arguments or submission on that. However, I believe it appropriate to offer each of the parties an opportunity to review, and comment on the adjustment calculations. I kindly ask that counsel make their comments within two weeks of the date of this decision. Following that, I will issue a final order.

[50] The order will also require Stearman to deliver to EDM Holdings the invoicing from the suppliers and any other related warranty paperwork in relation to the HVAC and toilet/pump

DATED at Halifax, Nova Scotia, this 30th day of May, 2011.

Michael J. O'Hara
Adjudicator