IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: ***Acadia Pipe Organs Ltd. v. Varnus,*** **2022 NSSM 5**

Date: 2022-01-23
Docket: SCCH 507970

BETWEEN

ACADIA PIPE ORGANS LTD.

CLAIMANT

AND

XAVER VARNUS

DEFENDANT

Heard: December 10, 2021 and January 7, 2022

For the Parties: Claimant – Mark Holden, Counsel

Defendant – Kathryn Dumke QC and Danielle Cable (Articled Clerk) on Dec 6 only and then the Defendant acted in person

Decision – January 23, 2022

DECISION & ORDER

1. Most business transactions are governed by the law of contacts. When someone sells goods to a person, the law of contract governs the obligations and rights of the parties. The same is true when someone agrees to provide services. It is the contract between the parties that determines what the provider of services must do and what the recipient can expect.

2. This case involves the latter type of contract.

3. The Claimant is a world-class organist. Originally from Europe, he moved to Canada. He resides in Queens County, Nova Scotia. He planned to establish an international organ festival. To that end he bought an abandoned church in Brooklyn, Queens County, with the intent of turning it into a concert venue.

4. At the beginning of the second day of hearing and prior completing cross examination of the Claimant's witnesses and to testifying, the Claimant applied to have a Hungarian interpreter translate his evidence. Originally represented by counsel, the Defendant had assumed responsibility for his own defence.

5. By this point the Court had heard evidence and seen documents that showed the Claimant's fluency in English, as the transaction and the surrounding communications which form the basis for the claim were transacted in English. The Court concluded an interpreter was not necessary to ensure the Defendant a full and fair hearing, the complexity that would be added to the proceedings and the difficulty for the Claimant in dealing with the details through translation outweighed and benefit that would accrue to the Defendant. The application was denied.

6. Throughout this hearing the witnesses provided a significant amount of technical evidence regarding the workings of a pipe organ. They were interesting and instructive to the Court. The Defendant asserted, by way of defence, the Claimant had failed in its contractual obligations as was evident by a number of technical pieces of work that were not done properly or not done at all. Expert evidence was called to elaborate on work that needed to be done for the organ to be used as was intended.

7. On August 12, 2020 the Defendant sent to following email message to the Claimant's principal, Colin Walsh.

> My name is Xaver Varnus, I am a concert organist by profession. I recently bought a 19th century church in Brooklyn, Nova Scotia that originally did not have a pipe organ. Also I have purchased a 24-stop Casavant organ from a church in Nova Scotia and would like to receive a quote from you for relocating the organ. This instrument was built in 1977, a typical Casavant design, but its specification is a bit more exciting because it already divided the 24 stops into 3 manuals and Casavant did not build a principal or a flute 8 'stop on the Swell, only two strings. In the case of Bach's works, Positiv and Swell together give a vivid counterpoint to the Great Organ. We took exact dimensions of the instrument and it's (sic) new home and it fits perfectly. Its condition is excellent, I enjoyed playing it for several hours last week with great pleasure. **I would be grateful if you could send me a quote for disassembling, transporting and assembling the instrument**. From now until February, the work can be done at any time, I have already started moving into the church a week ago, (Emphasis added)

8. Mr. Walsh immediately replied to the message asking for additional information.

9. The Defendant sent pictures to the Claimant and noted in his email that 'it won't be a complicated thing to move the instrument'; that he studied organ building and had experience in organ installation and that he planned to replace parts of the organs electrical system himself.

10. There was a friendly exchange between Mssrs Walsh and Varnus, consistent with what one might expect of individuals devoted to a particular craft. At 3:31 am on August 13, the Defendant emailed Mr. Walsh wit details of his personal background and ended the message with 'So please consider how to do the relocating and send me a reasonable quote.'

11. On August 14, the Defendant emailed "I don't want to look pushy, and I didn't lose hope that you'll send me a quote today."

12. The Claimant replied he had obtained some information about the organ from friends and stated:

> Having not seen your new church or knowing what would be involved installing it there, I am prepared to give the following quote.
> To Move the organ from Truro to your place in Brooklyn, including rented trucks, helpers and mileage. I think that $35000.00 would be a fair number.
> Remove the organ from its current location, Pack pipework in trays, dismantle and move all parts and components including the blower. Clean parts for handling, and transporting to Brooklyn Nova Scotia.
> The organ will be installed in the requested location and all actions and functions properly connected and made to operate efficiently, Install pipework and tune.
> …
> This does not include any building work or repairs to your church to accommodate the instrument. It does not include any house wiring or unwiring of AC electric circuits.
> It assumes a clean level floor and room to work properly….

13. On August 17, in a long email the Defendant stated he was seeking quotes from several organ builders. He noted costs applicable in Europe for similar work. He then says:

> The cheapest of these four is asking for $25000 and comes with a two-year warranty on the work done during the relocation. Of these four, you gave the highest price. However, it is an old principle that I always want to support local masters.
> ….
> You will also benefit from professional glory if you relocate my organ to Brooklyn.
> So that would be my offer: if we're both willing to compromise and you take the job for $28000 and give a 2-year warranty on the relocation work, then you can start work on September 1st…..

14. By email on August 19, 2020 Mr. Walsh replied to Mr. Varnus. He noted he was not aware of other organ builders in this area who could do the work; that he was please the Defendant was relocating the organ; and

> That being said, I agree to your proposal, and am happy to include a warranty on our work for five years. However, we will not be able to begin the project on Srptember 1 as we ar in the closing stages of rebuilding a large 4m Casavant in Halifax. A more practical date will be the beginning of October.
>
> …

15. On August 21, Mr. Varnus stated that 'Starting in October is a lot more advantageous to me too….'

16. In the subsequent weeks, the Claimant visited the organ and commented on its condition to the Defendant. He noted the reeds were wilted and bent and the 'pipes were moved too far sharp. The tuners are torn beyond their design, and it is pretty messy looking'. But he felt overall the organ was in excellent condition.

17. The work proceeded in October 2020. The site where the organ was not exactly as the Defendant had represented and the Claimant had to do additional work such as removing carpets and railings in order to assemble the organ in its new location.

18. The Claimant's two assistants – John Bogardus and Andrew Tousenard testified about the work they did. They confirmed Mr. Varnus was ever present on the work site and requested additional work from them.

19. On October 6, Mr. Walsh, who had spent money on vehicle rental and was paying two employees told Mr. Varnus he needed money. There were some commitments made for payment, but they were not met.

20. Mr. Walsh testified he had never had difficulties being paid for his work. Though not paid, he carried on with the work he was required to do. By late October the relationship was breaking down.

21. The Defendant paid $17000 on account with payments on October 20 ($3000), October 26 ($3000), October 30 ($8000) and November 5 ($3000). Subsequently the Claimant issued an invoice for the outstanding balance of $15200.

22. he Brooklyn Church was an uninsulated building alongside the ocean. Mr. Walsh, who was responsible for 'tuning the organ' indicated that given temperature fluctuations in the Church, due to a poor heating system and the absence of insulation, though five attempts were made, the organ would not hold its tuning. He stated the normal temperature for tuning is a stable temperature of around 70 F. but when they were trying to do it the Church was as cold as 50 F with fluctuations. His evidence was that if a steady temperature was maintained in the Church, the organ would hold its tuning, but without that the organ would not remain tuned.

23. The Claimant was asked about items identified by the Defendant as work the Claimant ought to have done.

24. The Defendant, in correspondence, identified a 14 step procedure that is the international standard for organ relocation. The Claimant's evidence he was not aware of this standard, and that it was not what was included in the contract.

25. The Defendant asserted the organ pipes should have been cleaned. Mr. Walsh's evidence is this was not part of the contract and to do so would have cost an extra $10,000.

26. Mr. Varnus says the Claimant only installed one of three tremolos. Mr. Walsh contradicts this and says the tremolos were installed and work.

27. Mr. Varnus stated he expected the Claimant to ‘voice’ the pipes. Mr. Walsh denies this was a part of the contract.

28. There are other examples of items the Defendant says were to be done or work undertaken. Generally, the Claimant says these items were not a part of the contract and for that reason they were not done.

29. While the Claimant and its personnel were on site, the Defendant was almost ever present. He adduces evidence o suggest the work was not being done in a careful or workmanlike manner, as the Claimant’s assistants were lifting heavy pieces of equipment without using a mechanical aid. Though that was the Defendant’s view, there was no objective evidence to support his conclusion.

30. The Defendant also used the personnel on site to complete some work in his home and not related to the organ relocation. There was a side oral agreement regarding an exchange of a shower stall for some of this work. Nothing turns on this, other than to show the Defendant had no difficulty is using the Claimant’s resources for his own convenience.

31. The Defendant called Robert Hillier, an experienced organ builder from Toronto to testify. Mr. Hillier introduced the Defendant to the Truro Organ. He also quoted a price of $65000 to move the organ.

32. Mr. Hillier indicated the items normally included in his contracts for moving an organ. These included cleaning (washing pipes, cleaning valves and restoring the mechanical hub), tuning and regulating. He was clear these items are part of his stipulated work and are part of his written contract.

33. Mr. Hillier commented on the optimum temperature for tuning a pipe organ. He noted that dust in the pipes affects tuning and dust on the reeds is more serious. Most church organs are tuned at temperatures between 65 F – 70 F. Though most can be designed to tune at a lower temperature, say 60 F – 65 F, today he said most are tuned at 68 F. He noted every organ reacts differently to sunlight, but he could not comment on the effect of sun on the Brooklyn Church.

34. Mr. Hillier quoted Mr. Varnus for 5 days of work, with his assistant, to ‘finish installation of the tremolos, assist you (sic) local electrician to wire the motor properly, fully tune the organ and spend about 3.5 days of regulation of the pipes. to allow the organ to be used for performances. His price for this work was $8655 + HST.

Analysis

35. The issue in this case is what were the terms of the contract? There were exchanges of emails which resulted in a written agreement.

36. The aim of a court, in construing a written agreement, is to determine the intentions of the parties to that agreement. The presumption is that the parties have intended what they have said. Their words must be construed as they stand. See: *Chitty on Contracts Volume 1, General Principles*, 27th ed. (1994) at 580.

37. Where the agreement has been reduced to writing, the parol evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at app. 455-456.

38. The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted altering, varying, or interpreting the words used in the writing.

39. It is also not open to a party to unilaterally add terms to a contract that were not what was agreed upon.

40. These are the key principles.

41. To create a contract there must be:

- an 'offer' - indication by one person (the offeror) to another (the offeree) that she is prepared to enter into a legally binding agreement (contract) with one or more persons upon terms that are certain or capable of being made certain,
- an 'acceptance' - the assent to an offer by words or conduct by the person to whom the offer is made, and
- 'consideration' - what one party to a contract gives, or promises, in exchange for what is being given or promised from the other side.

42. In this matter the Defendant initialed the contractual process by inviting the Claimant to quote 'for disassembling, transporting and assembling the instrument'. It was open to the Defendant to state any terms he wanted included in the contact, such as any applicable international standards, or cleaning of pipes or for regulation of the instrument. He did not do so. In contract terms his 'offer' was to obtain a price for three things – disassembly, transport and assembly in Brooklyn.

43. In reply to this invitation, on August 14, 2020, Mr. Walsh, on behalf of the Claimant offered to do the work stipulated by the Defendant for $35000. Included in the work was 'Install pipework and tune.' In other words, he made an offer to do the work outlined in the Defendant's email plus tuning for a price of $35000.

44. The Defendant, did not accept the price offered by the Claimant, but counter-offered on price for $28000. On August 19, Mr. Walsh accepted the counter-offer and added that a five year warranty would be provided. One more term needed to be addressed, the start date.

45. The Claimant indicated he would prefer to start the work in October, so that term was added for the Defendant's reply. The Defendant accepted an October start date.

46. At this point there was a contract between the parties for the disassembly, transport and relocation of the organ from Truro to Brooklyn, tuning, a price of $28000 and a start date of the beginning of October.

47. The contract did not contain any specific terms regarding standards for the work, a requirement for cleaning or regulation and specifically exempted electrical work. It had been open to the Defendant, an experienced organist and by his own description one who was familiar with organ relocation, to specify work he wanted included. He had had discussions with Mr. Hillier who indicted his costs would be $65000 for the work, so Mr. Varnus should have known that something less was being proposed by Mr. Walsh.

48. Therefore I find there was a written contract between the parties for the work specified by Mr. Varnus in his initial email. There were no other terms than those specified in the exchange of messages. In particular there were no requirements for cleaning or regulating the organ.

49. There is one aspect of the contract price which is not specified and which must be addressed in a determination of whether the Harmonized Sales Tax of 15%

is added as a term of the contract. Mr. Walsh asserts that his price was for $28000 + HST. Mr. Varnus claims that HST is included in the $28000.

50. This issue was thoroughly reviewed in British Columbia in Fast Trac Bobcat v. KWH Constructors Ltd., 2001 BCSC 1185 (CanLII). The decision has been relied upon by other cases in that Province. I was not able to locate any Nova Scotia authority on point but accept the British Columbia Supreme Court's analysis as persuasive.

> [22] Whether or not GST is payable falls to be decided on the basis of the cases dealing with that issue, not on the basis of an implied term.
>
> [23] The issue may be posed as follows: when a contract is silent as to GST, is the GST included in the purchase price or is it additional to the purchase price? It is clear from the authorities that the matter is one of statutory interpretation. The relevant sections of the ***Excise Tax Act***, R.S.C. 1985, c. E-15 are as follows:
>
> > 165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.
> >
> > 221(1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.
> >
> > 223(1) Every registrant who makes a taxable supply to a recipient shall
> >
> > (a) **where an invoice or receipt is issued to, or an agreement in writing is entered into with, the recipient in respect of the supply, indicate in the invoice, receipt or agreement either**
> >
> > (i) the total tax payable in respect of the supply in a manner that clearly indicates the amount of that total, or
> >
> > (ii) the total of the rates at which the tax is payable in respect of the supply and, where the invoice, receipt or agreement relates to supplies in respect of which tax is payable and supplies in respect of which

no tax is payable, the supplies to which tax at those rates applies; and

(b) in any other case, indicate in the prescribed manner that amount paid or payable by the recipient includes the tax payable in respect of the supply.

224. Where a supplier has made a taxable supply to a recipient, is required under this Part to collect tax from the recipient in respect of the supply, has complied with subsection 223(1) in respect of the supply and has accounted for or remitted the tax payable by the recipient in respect of the supply to the Receiver General but has not collected the tax from the recipient, the supplier may bring an action in a court of competent jurisdiction to recover the tax from the recipient as though it were a debt by the recipient to the supplier.

[emphasis added]

[24] The effect of s. 165(1) is to impose a mandatory obligation on the recipient of a "taxable supply" to pay GST to the Crown. The effect of s. 221(1) is to impose a mandatory obligation on the supplier of the taxable supply to collect GST on the Crown's behalf. As a matter of policy, Revenue Canada pursues collection from the vendor as opposed to the purchaser. If the vendor is unable to obtain the funds from the purchaser, the vendor must pay Revenue Canada itself but may then seek indemnification from the purchaser pursuant to s. 224. Section 224 requires the vendor be in compliance with section s. 223(1). It is the interpretation of ss. 223(1) and 224 which has led to a division in the authorities.

[25] The most recent analysis of the issue in British Columbia is in ***Leong v. Princess Investments Ltd.***, [1999] B.C.J. No. 2042 (S.C.) in which Madam Justice Dorgan thoroughly canvassed the Canadian authorities. Dorgan J. held that a supplier of a taxable supply need not be a "registrant" under the *Act* to avail itself of s. 224 as s. 224 does not distinguish between "registrants" and "non-registrants". Dorgan J. stated at para. 10:

> It is unlikely that Parliament intended to provide a remedy for one category of supplier and not the other. Thus, the disclosure requirements set out in s. 223(1) are incorporated by reference into s. 224, such that they apply to all suppliers.

[26] In order to determine whether a supplier can avail itself of s. 224 the court must determine whether or not the supplier complied with the disclosure requirements of s. 223(1). According to Dorgan J., that turns on the purpose of s. 223(1).

[27] Dorgan J. notes that two competing views of s. 223(1) emerge from the Canadian authorities. The first line of cases interprets the purpose of s. 223(1) to be the protection of consumers. The decision of Kirkpatrick J. in ***Deep Six Developments Inc. v. Kassam***, [1998] B.C.J. No. 491 (S.C.) falls in this category as do several cases from other jurisdictions. Kirkpatrick J. indicated the purpose of s. 223(1) was to ensure consumers would "know precisely the cost of their purchase". Courts which adopt the consumer protection standpoint tend to place a strict interpretation on what constitutes an "invoice or receipt" and are swayed by the length of time between the sale and the provision of the "invoice or receipt" to the purchaser. In ***Deep Six***, Kirkpatrick J. noted it was "significant" that notification did not occur until 27 months after the sale. Further, she held that notification in the form of a demand letter failed to meet the requirements of s. 223(1).

[28] The second line of cases referred to by Dorgan J. in ***Leong***, supports the interpretation that, given the mandatory burden s.165(1) imposes on the recipient of a taxable supply, s.223(1) exists to enable a purchaser to discern the amount of tax paid or payable to the Crown. Dorgan J.'s own decision falls into this category as do the decisions of Hutchison J. in ***Dworak v. Kimpton***, [1996] G.S.T.C. 97 (B.C.S.C.), Chamberlist J. in ***B & B Music Ltd. v. Thompson River Music Co.***, [1998] B.C.J. No. 1423 (S.C.) and several cases from other jurisdictions (including a decision of the New Brunswick Court of Appeal written by Bastarache J.A. (as he then was) in ***OCCO Development Ltd. v. McCauley***, [1996] G.S.T.C. 16).

[29] In ***Leong***, Dorgan J. found that the goal of the ***Excise Tax Act*** is to permit the recovery of taxes for the Crown. She then found at para.18:

> If s. 223(1) is to be regarded as a formal notice provision, as opposed to a "consumer protection" provision, and in my opinion, this view better accords with the intention of Parliament, it seems that the disclosure requirements could be readily satisfied.

[30] In ***Leong*** as well as in two Ontario authorities, a demand letter, sent several months after the completion of the sale, constituted sufficient notice pursuant to s. 223(1). Dorgan J. noted at para. 27 that s. 223(1) contains no reference to notice "within a reasonable time" and therefore "notice in the form of an invoice, which is defined very broadly, may be provided after the fact".

[31] In ***Dworak***, an invoice was sent 30 months after the transaction. Hutchison J. found the purchaser was required to indemnify the vendor under s. 224 although his decision was based on his having found the contract for sale to have contemplated the payment of GST by the purchaser. Nonetheless, he then went on to state at para. 25:

> When a contract makes no statement as to the treatment of GST the tax of 7% is in addition to the consideration under the contract. That is the effect of the imposition of the tax on the purchaser by ss.(1) of s.165.

> [32] In ***B & B Music***, Chamberlist J. found the vendor to have complied with the s. 223(1) requirements by sending an invoice within three months of the transaction. He approved of Hutchison J.'s comments in ***Dworak*** and stated at para. 30:
>
> > …the agreement is silent as to GST. The silence in the agreement results in the 7% GST being in addition to the purchase price.
>
> [33] Dorgan J. summarized her position by stating at para. 28:
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> > In my view, the Act places the obligation to pay GST on the recipient of a taxable supply. That statutory obligation is not altered by silence as to GST liability in the contract of supply.
>
> [34] Finally, Dorgan J. also addressed the issue of penalties and interest arising from a supplier's failure to remit GST. She held that the supplier is liable to pay those costs for the reasons provided in ***Len's Construction Midland Ltd. v. Georgian Bay Native Friendship Centre Inc.*** (1998), 98 G.T.C. 6112 (Ont. Gen. Div.):
>
> > …the vendor [is] responsible for the interest and penalties for two reasons: 1) s.224 is silent as to penalties and interest; 2) the penalty and interest liabilities only exist because of the vendor's failure to collect and remit the GST, and not because of the purchaser's failure to pay it.
>
> [35] It should be noted that in ***Dworak***, Hutchison J. held that to determine the issue of penalties and interest on an 18A application would not be appropriate as in that case there was an issue as to whether the purchaser induced the vendor into believing the sale was exempt from GST by holding himself out to be registered under the *Act*, suggesting that in some situations, the purchaser may be liable for the penalties and interest.
>
> [36] While the authorities are divided, I am satisfied that when a contract is silent as to GST, GST should be considered to be in addition to the purchase price. Of the B.C. authorities, the decision of Dorgan J. in ***Leong***, provides the most thorough and persuasive analysis of this issue. In addition, the case law from other jurisdictions which support this interpretation tends to be more recent and more persuasive than the authorities which support the interpretation in ***Deep Six***

51. I find the contract between the parties was for $28000 + HST ($4200) for a total of $32200. The Claimant performed the contract and did additional things that were not required by it, without charging extra. The sum of $17000 has been paid meaning the Claim is for $15200. The Claimant is entitled to an order for that amount.

52. The work was done by the Claimant and billed. Though the Defendant tried to add or impose terms on the contract as a precondition to payment, that was not appropriate. These unilateral imposition of terms on the contractual relationship were of no force or effect. They were not part of the agreement.

53. The Claimant is entitled to :

a. Damages - $15200
b. Costs - Court Fee - $199.35
- Service Claim - $230
- Service subpoenas - $314.45
Total - $15943.80

54. The Claimant is entitled to an order for that amount. If a formal order is required, Counsel for the Claimant may prepare it and forward it to the Court for signature.

Dated at Halifax, Nova Scotia, January 23, 2022.

Darrel Pink

Small Claims Court Adjudicator