No party had an unfair advantage. Accordingly, summary judgment was granted, and Finn Way's action was dismissed.

This decision provides an important example of how summary judgment can effectively be used in the context of tendering. It also provides support for those administering tender bids, not only by upholding their discretion under the provided instructions, but also by finding that when the circumstances of a tender change, a clear and logical decision will have the support of the courts.

Ontario Superior Court of Justice
Shaw J.
December 10, 2015

CASE SUMMARY

Jay Nathwani
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DO NOT SKIMP ON THE DETAILS: COURT OF APPEAL THROWS OUT CONTRACTOR'S CLAIM DUE TO INSUFFICIENT BACKUP

Ross-Clair v. Canada (Attorney General)

In the recent case of *Ross-Clair v. Canada (Attorney General)*, the Ontario Court of Appeal affirmed the enforceability of contractual clauses requiring submission of details to support a claim for extras. The court also emphasized that in interpreting contractual notice requirements, the provisions must be read in harmony with the rest of the contract in order to effect the commercial purposes of the contracting party. The effect of the court's decision was to deny the contractor's claim for approximately $1.4 million in extras.

Background

The contractor, Ross-Clair, a division of R.O.M. Contractors Inc., entered into a contact with Public Works and Government Services Canada ("PWGSC") for the construction of management offices at Millhaven Institution. The project engineer was NORR Limited. The contract provided for a detailed procedure governing claims for extras, including claims for delay. The procedure, in brief, was as follows:

1. Within 10 days of the occurrence of an act or discovery giving rise to an extra, the contractor must provide notice in writing to the Engineer;
2. Where a notice has been given, the contractor must provide a written claim to the Engineer within 30 days of the issuance of a certificate of completion. The written claim must contain "a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified…."

The contract explicitly provided that failure to provide written notice or a claim would forfeit the contractor's right to compensation for an extra. The contract also provided for an arbitration in the event of a disagreement as to the Engineer's determination of a claim for extras.

In the course of the project, Ross-Clair advanced two claims for extras. The principal claim, in the amount of $1,437,976, was first advanced in a letter dated December 5, 2008 from Ross-Clair to the Engineer. The letter alleged that a planned start date of December 15, 2008, for a phase of the construction, had been delayed by Millhaven Institution, and stated that there would be delays and extra costs.

The Engineer responded on December 16, 2008, requesting additional details to support the claim. This request was repeated by PWGSC at a meeting held December 22, 2008. Ross-Clair agreed to provide the details by January 10, 2009, but failed to do so.

The project was scheduled for completion on January 25, 2009, but the schedule was not met. On February 27, 2009, PWGSC wrote to Ross-Clair to express concern about the delay, and to remind Ross-Clair of its promise to submit a request for a time extension.

On March 2, 2009, Ross-Clair responded. In its letter, Ross-Clair cited "delays due to site conditions, weather conditions, alterations to the contract and disruptions to the original sequence of construction" as the reason for the delay. The letter attached an "Additional Costs Summary" that listed various subcontractors and the costs attributed to their work, totalling $1,437,976. The letter contained no other supporting documentation.

In April 2009, PWGSC wrote twice to Ross-Clair requesting further documentation in support of Ross-Clair's request for an extension of time. The Engineer wrote to Ross-Clair in May 2009.

On October 6, 2009, PWGSC responded to Ross-Clair's request for an extension to time by approving an extension to September 14, 2009, but without prejudice to its right to contest Ross-Clair's entitlement to compensation for the extension of time.

On March 31, 2011, Ross-Clair submitted a further claim for extras as a result of delays and change orders, in the amount of $766,700. The letter contained no breakdown of the costs being claimed.

On April 20, 2011, PWGSC responded that the claim contained insufficient details to determine if the claim was justified, and asked Ross-Clair to provide documentation to support both the original and the revised claim, which together totalled $2,204,676.

The project was certified complete on February 10, 2012.

On May 28, 2013, Ross-Clair provided PWGSC with a report called "Analysis of Delays and Additional Costs". No further communication took place related to the claims being advanced.

The claims remained outstanding. PWGSC took the position that Ross-Clair had not provided a description of the facts and circumstances giving rise to the claim sufficient to allow the Engineer to make a determination of the merits. The Engineer appears to have taken a similar position and refused to decide the claim on its merits; accordingly, the parties were at an impasse. They could not even have recourse to the dispute resolution provisions of their contract, because a decision by the Engineer was a prerequisite to proceeding with an arbitration.

In order to advance its claim in the face of the Engineer's refusal to take a position, Ross-Clair brought an application before the Superior Court for an order compelling PWGSC to consider the claim.

Decision of the Lower Court

The application was heard by Justice Lederer. Justice Lederer noted that PWGSC acknowledged that initial notice of the claim had been provided in accordance with the contract. At issue was whether Ross-Clair had provided "a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified," in accordance with the terms of the contract.

Justice Lederer saw the question before him as "whether what is required is notice of the claim or proof of it?" He saw the answer lying between the two positions. In his view, "There has to be more than notice but less than the proof an arbitrator would require. … [T]here has to be enough information for the Engineer to be able to decide if the claim is justified. This need not be proof of the claim".

Justice Lederer relied on the Court of Appeal's decision in *Technicore Underground Inc. v. Toronto (City)* for the proposition that providing proper notice of claim for extras in accordance with the contract is a condition precedent to the consideration of such a claim. The court observed that, unlike in *Technicore*, the contract did not use the language of a "detailed claim".

Justice Lederer concluded that the initial notice, combined with the Additional Cost Summary delivered on March 2, 2009, was sufficient to comply with the contract's requirement of a "sufficient description of the facts and circumstances … to enable the Engineer to determine whether or not the claim is justified". The court commented, in making this finding, that "the Engineer … is not a stranger to the project but an active participant in reviewing its progress".

Accordingly, Justice Lederer held that the $1,437,976 claim complied with the contract.

With respect to the further claim of $766,700, Justice Lederer found that the letter of March 31, 2011 did nothing more than increase the amount of the earlier claim by $766,700. The letter contained no description of the facts or circumstances explaining the increase. There was nothing on which the Engineer could base a decision. Applying *Technicore*'s central *ratio* that contractual notice requirements are enforceable, the court held that the report delivered May 28, 2013 could not be considered as it was delivered later than 30 days after the issuance of the Final Certificate of Completion.

In the result, Justice Lederer held that the Engineer was bound to consider the $1,437,976, but not the $766,700 claim.

PWGSC appealed in respect of the $1,437,976 claim; Ross-Clair did not cross-appeal.

Court of Appeal

The Court of Appeal found that Justice Lederer looked too narrowly at the words requiring a "sufficient description" of the claim, without having regard to how the requirement fit into the overall contractual scheme for the determination of claims for extras. After reviewing the applicable contractual provisions, the court concluded that the contract "contemplates a process for dealing with a contractor's claim for extras in which the Engineer has control sufficient that it can fulfill its obligation to determine whether a claim is justified. …The Engineer fulfills this important role in the context of a [contractual procedure] that, in my view, depends on a highly specific informational component".

The Court of Appeal concluded that Justice Lederer, when interpreting the information required by the contract, had looked at the contractual provision in isolation, without taking into account the contractual context. This, the court held, constituted an error of law.

The Court of Appeal went on to find that even though the word "detailed" was not included in the contract, the contract nonetheless required that a claim "must be supported by detailed information. Without detailed information, it is difficult to see how the Engineer would be able to make a decision as to the validity of a claim". The court is of the view that "such a decision requires 'proof' that the claim is justified".

On the facts of the case, the court found that the letters sent by Ross-Clair provided "little if any support" for the $1,437,976 claim. Among other deficiencies that the court identified, the letters, "failed to include information relating to the nature and extent of [PWGSC's] responsibility for the delay, to address whether compensation had already been paid on account of the extra expense or to explain whether the extra expense" fell within the compensable classes under the contract. Moreover, the letters were inconsistent and therefore confusing on key points.

The court summarized its conclusions by finding that "the information contained in the letters was lacking in specificity, confusing in terms of identifying the parts of the Project affected by the delay and accompanied by virtually no information in support of the extra work done and the costs associated with any such work".

The court allowed the appeal, set aside the order of Lederer, dismissed the application and declared that Ross-Clair's claim for extra payment was barred by operation of the contract.

Conclusion

Ross-Clair builds on the important precedent of the *Technicore* case. It firmly entrenches, in Ontario law, the principle that contractual notice requirements, including requirements to give detailed accounts of claims, are enforceable, and ought to be taken seriously. If required to provide details of a claim sufficient to allow an initial adjudication by the project consultant, it will not be sufficient for parties to a construction contract to deliver incomplete or skeletal information. Parties to construction contracts would be well-advised to ensure their staff are equipped to comply with notice requirements by delivering submissions that are both timely and of sufficient quality.

Ontario Court of Appeal

Gillese J.A., Gloria Epstein J.A., Roberts J.A.
March 14, 2016

CASE SUMMARY

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TENDERING: WAIVER OF COMPENSATION CLAUSE COMPLETE ANSWER TO CLAIM

Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township)

The Township of Algonquin Highlands intended to expand its Haliburton-Stanhope airport by adding a new runway and rehabilitating an existing one. The project was controversial and politically charged.

Todd Brothers Contracting Limited was the low bidder. The request for tenders provided that tenders would be open for acceptance by the Township for 45 days following the tender closing date. However, after the Canadian Environmental Assessment Agency (CEAA) unexpectedly announced that it would conduct a review of the project, at the request of the Township, Todd Brothers agreed to extend the time for acceptance of its tender to July 15, 2009.

When in late June 2009, the CEAA review had still not been completed, the Township decided to seek approval from the Ministry of Agriculture, Food and Municipal Affairs to complete the project in three phases. The first phase, Part D of the RFT, did not require CEAA approval, and could therefore be completed without waiting for the results of the CEAA review. The remaining phases would have to await completion of the CEAA review. Todd Brothers agreed to this phasing of the project and to a further extension of the time for acceptance of its tender.

In September of 2009, council passed a resolution accepting Todd Brothers' tender "in accordance with the tender documents, subject to the Canadian Environmental Assessment Act".

Even though CEAA completed its review in December of 2010 and approved the airport project subject to certain conditions, the composition of the Township council had changed in the meantime. Many of the new council members had campaigned on an anti-airport platform, and the new council passed a resolution to defer the execution of the CEAA report until a further review of the project. In the end, after only one of the four parts (Part D) was completed, the Township decided not to proceed with the project. Instead, the Township proceeded with a different project pursuant to a January 2011 plan by the Ministry of Natural Resources, as part of which the Ministry would relocate its northeastern fire management headquarters, and consolidate its regional operations, at the Haliburton-Stanhope airport.

Todd Brothers sued for damages for breach of contract. The Township moved for summary judgment dismissing the action. To begin with, the Township argued that although council passed