COURT FILE NO.: 00-BN-7337
DATE: 2004 02 20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TRIO ROOFING SYSTEMS INC.	Kevin D. Sherkin, for the Plaintiff
Plaintiff	
- and -	
THE ATLAS CORPORATION	Salvatore Mannella, for the Defendant
Defendant	
	HEARD: February 11 and 12, 2004

REASONS FOR JUDGMENT

BELLEGHEM J.

The Issue

[1] The present case raises several related issues. However, the determinative issue is whether a fundamental breach by the defendant in honouring the terms of one contract can amount to an anticipatory breach of a

second, separate and discrete contract between the same parties. To state the issue in simple layman terms, it is this: Can a subcontractor say to his main contractor, "You haven't paid me for the first job, so I'm not going to do the second one"? … .

Background

[2] The plaintiff, Trio Roofing Systems Inc. (Trio), is a roofing subcontractor. The defendant, The Atlas Corporation (Atlas), is a general contractor. Atlas has built many schools. Trio did a couple of school roofing jobs for Atlas prior to 1999. Trio says that Atlas "shortchanged" Trio on the second job which gave rise to a warranty dispute. Nevertheless, Atlas and Trio subsequently contracted for Trio to do two roofing jobs for two schools being built by Atlas in 2000.

[3] The schools were identical. The roofing contracts were identical. The contract price in each case was $117,000.

[4] Under each contract, Trio was to submit a progress payment request around the 25th of the month. The request would be assessed by the architect in the next couple of weeks and payment would be anticipated by the end of the following month.

[5] On May 25, 2000, Trio submitted a progress request for 80%. It submitted a further progress request on June 22, 2000 for 95%. The 80% payment was made without complaint, following the certification by the architect on June 6, 2000. However, unknown to Trio, and overlooked by Atlas, was the fact that the architect had certified payment of 85% of the roofing contract. Atlas submitted its own payment requests, and presumably received the payment as though it had paid or was going to pay 85% of the roofing contract, when such, in fact, was not the case.

[6] It is arguable that Atlas' oversight put it in breach of its contract rights with Trio when it failed to remit the remaining 5% certified June 6. This argument is strengthened when the second progress payment request for 95% was made. We now had a case where 95% had been requested, 85% certified, and only 80% paid. Therefore, payment in accordance with the terms of the contract had not been made by the contractor.

[7] According to Mr. Curto, project manager for Atlas, Trio was refusing to begin the second roofing contract in July using the excuse that, while the contractor had called the roofers in, the building was "not ready". Curto said that it, in fact, was either ready, or if not completely "ready" was "sufficiently ready" for roofing to start and to proceed, uninterrupted, until finished. However, Mr. Maikawa testified on behalf of Trio that the second project was indeed not ready

for roofing, and that, in any event, the slowness in paying the June 22 invoice for 95% on the first contract was causing Trio concern as to whether it wanted to be involved in getting “shortchanged” again, or going “into the red” while waiting for Atlas to pay. He said that Trio was “getting cold feet” with respect to the second contract because of how it had been treated on the first one, i.e. a “déjà vu” of the problem experienced by Trio with Atlas on the earlier project.

[8] Atlas construed Trio’s hesitation to start the second contract as an “abandonment” of the second contract. It, therefore, went ahead and hired one Hamilton in early August to do the job. Hamilton charged approximately $17,000 more.

[9] A dispute respecting alleged deficiencies on the first job simmered on for a couple of months. In the end, however, it was agreed that Trio had completed the first job satisfactorily and was entitled ultimately to the outstanding 20% for a total of 100% payment without discount.

[10] However, Atlas seeks, in the present action, to set off against the 20% outstanding in the first contract, the extra $17,000 incurred in having Hamilton, at the last minute, do the second job. Atlas argues that the increased cost was caused by Trio’s alleged breach of the second roofing contract, which it alleges Trio “abandoned”.

[11] Trio's position, however, is that it was Atlas who was in anticipatory breach of the second contract, on the basis that its handling of the first contract demonstrated how it was going to carry out the second contract, ie. by either "shortchanging", or holding up payment, even though the job had been substantially completed. It also argues that Atlas breached the second contract by hiring Hamilton before the building was, in fact, ready for Trio to begin carrying out its roofing obligation under the second contract.

[12] More importantly, however, it argues that it should not be held accountable for the second job because it should not be required to have started it on the same terms as the first contract, under which Atlas was standing in breach.

Analysis

[13] There is no issue that Trio completed the first job. It is entitled to the balance owing of $35,069.25.

[14] The real issue is whether there should be setoff against this sum the sum of $17,620, which was paid by Atlas to Hamilton, who was called in at the last minute.

[15] On the evidence, it is clear that it was the manner of the billing, certification, and payment practices that created the situation which put Atlas in a "technical" breach of trust, *vis-à-vis* Trio. The evidence is conflicting as to whether Atlas even offered the extra 5% certified shortfall. Mr. Maikawa's evidence was more persuasive on this issue. He testified that the 5% had not been offered. There was a cheque produced at the trial, (but surprisingly not before), by Atlas showing that Atlas had discovered its error.

[16] It was put forward on behalf of Atlas that the payment was being withheld because of a missing or faulty WSIB certificate. I reject the defence evidence to this effect. There is nothing in the written material that supports it.

[17] In any event, there is evidence that the WSIB certificate, for the timeframe during which the 85%, certified on May 25 should have been paid, was in force. In addition, I have no reason to doubt Mr. Maikawa's evidence that he had the necessary WSIB certificate, and would have provided it if requested.

[18] I have no reason to reject the evidence of Mr. Ciaverella, to the extent that it corroborates there was a dispute over money. He recounted a shouting match between the Trio principal and his office. However, I find that that more likely had to do with the entire 20% rather than an alleged missing WSIB certificate.

[19] Mr. Maikawa testified that the real problem was one of non-communication. This was probably the most accurate assessment of the situation. Objectively viewed, the roofing contract was a very minor part of the entire contract, ie. $117,000 out of a total contract of approximately $5,000,000. In turn, 20% of the roofing contract, ie. the $35,000 in dispute, was “small potatoes” compared to the concerns of the contractor, Atlas.

[20] Atlas overlooked the extra 5% that had been certified, and merely paid on the basis of what had been submitted, rather than what had been certified. Even allowing that the failure to pay the 5% was a legitimate oversight, I am satisfied, that Atlas’ demand that Trio start the second job, on the contractor’s terms, rather than on the terms contracted for, ie. to begin roofing even though the building was not ready for it, was something that was not contemplated by Trio when it agreed to do the roofing jobs.

[21] It was certainly never agreed that they would accept anything less than what they were entitled to as they went along. Even though the breach of trust was “technical” in nature, the means by which it came about evidenced the breakdown in the relationship between the parties.

[22] The allegation of deficiencies as an excuse for holding back payment was a “red herring”. The architect report is demonstrably in error respecting, for example, the “stone grey” flashing.

[23] Atlas’ concern was to ensure that it did not overpay as it went, and that the roofing job was done when and how it expected. In taking this approach it overlooked the fact that it had a contract with Trio and was as obligated to the terms of the contract as was Trio.

[24] Atlas’ billing practice, which inadvertently put it into a breach of trust, its unrealistic demand to begin roofing even though the building was not ready to be done uninterrupted, its throwing up of alleged unfounded deficiencies as a basis for holding back payment, but most of all its failure to communicate, was such that Trio reasonably concluded that Atlas would carry out the second contract in exactly the same way.

[25] In doing so, Atlas anticipatorily breached the second contract. Atlas’ anticipatory breach entitled Trio to refuse to carry out its side of the bargain.

> Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due. What must be shown before such a breach is said to occur was stated thus by Lord Alverstone in an English case, cited and relied upon by Walsh J. of the Supreme Court of Alberta in *Reed* v. *McVeigh*:

> The conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaching the contract no longer intends to be bound by its provisions.
>
> The authorities reveal that, for this type of breach to occur the following must be established: (1) conduct which amounts to a total rejection of the obligations of the contract; (2) lack of justification for such conduct. If, to these, is added the acceptance by the innocent party of the repudiation, then the effect will be to terminate the contract. This does not mean that the repudiating party is free from all liability. It simply means that the innocent party may be freed from *his* obligations (as in the case of a breach at the due date of performance), and may pursue such remedies as would be available to him if the breach had taken place at the time when performance was due. [The Law of Contract in Canada, G.H.L. Fridman, Q.C. (4th) Carswell p. 638]

[26] The conduct of Atlas, testified to by the witnesses on behalf of Trio which were called, evidenced a clear and unequivocal intention to carry out the second contract in a manner which would be just as in breach as it had in the original contract. The subcontractor could not have been reasonably expected to comply with the terms of the second contract facing a similar non-compliance in the second contract that it had faced in the first.

[27] It follows, therefore, that the actions of Atlas – failing to pay in time, the "technical" breach of trust, the throwing up of spurious allegations of deficiencies, the failure to communicate, the requesting the roofers to appear when the job was not ready to start, hiring Hamilton without giving written notice, regardless of whether the notice called for in the contract is mandatory – all evidenced an

intention by Atlas not to honour its contractual obligations and to breach the second contract in exactly the same manner. This is a classic example of an anticipatory breach. Trio was, therefore, justified in refusing to commence carrying out its obligation under the second contract in the face of such a clear and flagrant breach by Atlas.

Conclusion

[28] In conclusion, I find that the plaintiff's claim of $35,069.25 has been proven.

[29] The contract provided for 0% interest. I see no reason to depart from enforcing that for which the parties contracted. It follows that only post-judgment interest is allowed, ie. no prejudgment interest.

[30] Judgment will therefore issue in favour of the plaintiff for $35,069.25.

[31] Costs may be dealt with by written submissions, not to exceed two pages each, exclusive of offers to settle or exhibits. The plaintiff's costs argument will be submitted within 15 days, the defendant's costs submissions within 10 days thereafter, with five days to the plaintiff to reply. Once I have the submissions, I will issue a costs endorsement.

_____

BELLEGHEM J.

Released: February 20, 2004

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