SUPREME COURT OF NOVA SCOTIA

Citation: *Dalhousie University v. Cogeneration and Energy Management Engineering Inc.*, 2017 NSSC 303

Date: 20171128
Docket: Hfx No. 458586
Registry: Halifax

Between:

Dalhousie University

Applicant

v.

Cogeneration and Energy Management Engineering Inc.
o/a Cem Engineering, a body corporate

Respondent

Decision

Judge: The Honourable Justice M. Heather Robertson

Heard: November 1, 2017, in Halifax, Nova Scotia

Counsel: Kevin Gibson and Melanie Gillis, for the Applicant
Michelle M. Kelly and Matt Saunders, for the Respondent

Robertson, J.:

[1] Dalhousie University ("Dalhousie") makes application pursuant to *Civil Procedure Rules* 37.01 and 37.05 requesting that this Court sever its claim for liability and damages against Cogeneration and Energy Management Engineering Inc. ("CEM").

[2] Dalhousie further asks that the court confirm the dates previously reserved in a Motion for Directions before Justice Patrick Duncan, dated July 25, 2017, for the Hearing of the issue of liability only, on April 16, 17, and 18, 2018, and further confirming that the dates for the completion of necessary pre-hearing steps by the parties will also be adhered to, as set forth in the Motion for Directions.

[3] Dalhousie's Notice of Application filed on December 20, 2016, alleges breaches of contract and negligence by CEM. CEM's Notice of Contest was filed on January 23, 2017.

[4] *Civil Procedure Rules* – relevant rules:

> 37.01 A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.
>
> …
>
> 37.05 A judge may separate parts of a proceeding for any of the following reasons:
>
> (a) a party joined a party or claim inappropriately;
>
> (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
>
> (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[5] Dalhousie relies on *Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 314; *Rajkhowa v. Watson*, 2000 NSCA 50; *Healy v. Halifax (Regional Municipality)*, 2017 NSSC 83; and *Jeffery v. Naugler*, 2010 NSSC 385, in support of its application.

[6] CEM resists the application saying the severance of liability and damages will severely and negatively impact CEM for a number of reasons, which they identified as follows:

1. The threat of duplication is real if the issues are severed. CEM will effectively have to prepare for two almost identical hearings instead of one, wasting resources on repetitive discoveries, expert reports, and submissions;

2. Costs will be significantly higher if the application is severed. For example, there will be twice as much travel required for the witnesses. As CEM's team resides in Ontario, this will result in a costly inconvenience to the Respondent only;

3. Time will not be saved by having two separate hearings (especially when one considers the likely number of months that will pass between when liability is determined and the damages issues are heard);

4. Liability and damages are so interwoven, severance will result in the court being at a disadvantage given that it is unable to hear and understand the entirety of the case; and

5. There is a real risk that a decision on liability alone will be appealed because it is such a complex and important issue in the proceedings.

[7] Dalhousie argues that the severance would be just and convenient and that an earlier determination of liability would actually promote the resolution of disputed issues and lead to a speedy and inexpensive resolution.

[8] The Respondent, CEM, also relies on *Jeffrey, supra,* and *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2013 NSCA 116; *Rajkhowa v. Watson*, 2000 NSCA 50, 2000 CarswellNS 104 (NSCA); *Fraser v. Westminer Canada Ltd.*, 1998 CarswellNS 153; *Piercey (Guardian ad litem of) v. Lunenburg (County) District School Board*, 1993 CarswellNS 263; and *Rubens v. Sansome*, 2017 NLCA 32.

[9] Having reflected on these cases as they might apply in the context of this dispute, I turn to the claim made by the Plaintiff, Dalhousie.

Background

[10] In its Notice of December 20, 2016, at paras. 3-15, Dalhousie sets out the details of its claims. CEM's consulting agreement with Dalhousie involved Dalhousie's Campus Energy Master Plan for which CEM undertook to provide services that included:

(i) the provision of short and long term analysis of energy security and policy in Nova Scotia and its relation to Dalhousie's Energy Master Plan;

(ii) the review of current utility data and the provision of detailed projections on future utility use based upon the requirements of the Campus Master Plan;

(iii) the provision of recommendations for energy efficient design standards for new buildings and recommissioning existing buildings;

(iv) the performance of an Asset Condition Assessment and risk assessment of system and contingency scenarios, and provision of recommendations for the expansion and upgrade of the existing control system, optimization upgrades, and for the reduction of energy consumption;

(v) the provision of recommendations for facilities renewal and a recommended strategy for maximizing energy savings through energy retrofit projects while reducing deferred maintenance; and

(vi) the evaluation and provision of viable options for renewable, energy efficient and conservation projects.

[11] Dalhousie says CEM produced an Energy Generation Planning Report and a Supplement to its Energy Generation Planning Report, dated January 4, 2013, recommending Dalhousie implement an energy trigeneration system which would supply steam for heating and cooling to Dalhousie's facilities. Dalhousie says it agreed to this recommendation and asked CEM to prepare a detailed feasibility study for the replacement of Dalhousie's existing thermal plant with a trigeneration plant.

[12] On June 13, 2013, CEM produced a summary feasibility study report outlining specific benefits to Dalhousie of its recommended plan for trigeneration. Dalhousie continued its own due diligence of the proposal.

[13] Subsequently, in July 2014, CEM agreed it had made errors in its report and misrepresented the savings that could be achieved by the CEM recommended trigeneration mode and that Dalhousie would not be eligible for the special Load Retention Tariff ("LRT"), a special incentive made available by Nova Scotia Power Inc.

[14] CEM, to its credit, acknowledged that errors were made and addressed the issue in two very frank emails sent by Martin Lensink, the principal of CEM to Dalhousie, dated August 20, 2014, and August 25, 2014; they are reproduced here:

> From: Martin Lensink [. . .]
> Sent: Wednesday, August 20, 2014 5:27 PM
> To: Jeffrey Lamb
> CC: Ian Nason; John Hope; Omar Khartabil
> Subject: RE: Dalhousie Tri-Generation Project

Attachments: 4744_001.pdf

Jeff:

We will cease work on the trigen project, as you have instructed us.

Please note that we stopped charging to the project on July 18, when we identified and acknowledged our error and communicated that or Omar.

We are operating as of July 18, 2014 as if the attached Article XII applied to us. For further clarity, we interpret our obligation under Article XII to include re-work of as much of the nine (9) work packages which made up the $400,000 of services as Dalhousie requires.

We await your instructions.

Martin Lensink, P. Eng.
Principal-In-Charge
CEM Engineering
227 Bunting Road
St. Catharines, Ontario, L2M 3Y2
[. . .]

Increasing Earnings by Reducing Energy Cost

…

ARTICLE XII

PROFESSIONAL LIABILITY

The Consultant's design and workmanship incorporated into the working drawing must be consistent with the level of knowledge generally available to the profession. Any system designed by the Consultant (hereinafter call the "System") and found to be faulty or not in compliance with the provisions of this Agreement due to incorrect design shall be redesigned and such System shall be redesigned at no cost to the Owner, provided that written notice of such defective Services shall have been promptly given by the Owner to the Consulting during a period of one (1) year from the date that such Services were completed.

Notwithstanding any provisions herein, the liability of the Consultant for all claims in connection with the performance of the Services hereunder, shall be limited to reperformance of the defective Services to the Consultant's expense, and in no event shall the Consultant be liable for loss of use or loss of earnings or for any other special indirect or consequential damages of any nature howsoever caused or for damages occasioned by circumstances beyond the Consultant's control.

ARTICLE XIII

GENERAL TERMS AND CONDITIONS

Cooperation

(a) The Owner shall give due consideration to all designs, drawings, plans, specifications, reports and other information provided by the Consultant and shall make any decisions which he is required to make in connection therewith within a reasonable time so as not to delay the work of the Consultant.

(b) The Owner shall, at the request of the Consultant, provide the Consultant with the following information and documents relating thereto, except insofar…

…

From: Martin Lensink [. . .]
Sent: Monday, August 25, 2014 5:10 PM
To: Jeffrey Lamb
CC: Ian Nason; John Hope; Omar Khartabil
Subject: RE: Dalhousie Tri-Generation Project

Categories: Important

Jeff:

I cannot get Dalhousie off my mind. I feel absolutely terrible about the mistake in the Business Case. In hindsight, I was way too focused on the trigeneration project, and not nearly focused enough on the Base Case project and the benefits that it would generate to the University.

I will re-engineer any of the Reports or drawings or specification we have prepared for you to date at my own expense. I will do everything I can to make this right.

Martin Lensink, P. Eng.
Principal-In-Charge
CEM Engineering
227 Bunting Road
St. Catharines, Ontario, L2M 3Y2
[. . .]

[15] These factual admissions are significant to Dalhousie's motion for severance of liability and underpin its claim for breach of contract and negligence.

[16] In the course of negotiations between Dalhousie and CEM to achieve a resolution, the parties did explore the terms of arbitration proceedings. However they could not agree and ultimately CEM decided to contest both liability and damages, although they do say that certain admissions of fact might be achieved in the course of trial proceedings.

[17] CEM says that it responded to the issues raised by Dalhousie and with extra work undertaken at no cost to Dalhousie, it provided a revision to its Summary Report on July 31, 2014.

[18] Dalhousie then refused to respond to CEM, who pleads that Dalhousie failed to comply with s. 23 of its agreement with CEM allowing the dispute to be referred to an Arbitrator.

[19] CEM denies that it either breached its contract or was negligent and denies any loss of damages to Dalhousie by reason of its work.

[20] It is my task to perform an analysis of the pleadings and determine whether the issue of liability should be separated from the damages in this case.

[21] The factors set forth in *Jeffery, supra,* are of assistance in this task, as set out at para. 29:

> [29] In the case at bar, all parties have advanced their arguments on the basis of factors set out in the case law that predates the new rule. Those may be summarized as follows (with case references):
>
> - whether the proceedings "will be lengthier by reason of severance" and whether the plaintiff would be required to go through two trials and two sets of pretrial proceedings, *Lockhart v Village of New Minas* 2005 NSSC 93 (CanLII) at paras. 29, 30;
> - the extent of overlap of issues and evidence between the severable portions of the proceedings (*Lockhart, supra,* at para. 33)
> - whether severance would allow the parties to dispense with a major issue that may save time and resources in the long term (*Mitsui & Co. (Point Acoini) Ltd. v. Jones Power Co.* 1999 NSCA 39, at pp. 6 and 12.
> - the relative complexity of the respective severable portions of the proceeding. *i.e.*, whether one portion of the proceeding could proceed more expeditiously on its own than if tied to the more complex portion of the proceeding. *Kirby v. Strickland* 2008 NSCA 14 (CanLII) at para. 29.
> - whether "substantial cost has already been incurred on both issues" of liability and damages. *Piercey v. Lunenburg (County) District School Board* 1993 NSSC 7; 1993 CanLII 4495 (NS SC), 128 N.S.R. (2d) 232 at para. 20.
> - whether "several of the witnesses will give evidence on both the issues of liability and damages" *Piercey, supra,* at para 20.

- the reasonable likelihood that an appeal against the determination of liability may follow. *Piercey, supra* at para 21.
- whether the plaintiff's credibility is a significant issue to be resolved in the determination of liability as well as damages *Rajkhowa, supra,* at para. 38
- whether there is a reasonable basis to conclude that a trial on liability only will bring that matter to a conclusion, or only add to the cost and delay of the final determination. *Fraser v. Westminer Canada Ltd.* (1998) 168 N.S.R. (2d) 84 (NSSC), at para 22; *Stevens (Guardian ad litem of) v. Welsh* (2003) 2003 NSSC 142 (CanLII), 216 N.S.R. (2d) 253 (NSSC) at para 14.

[22] I have heard the parties submissions on these factors and read their briefs.

[23] It is my view that the court time now reserved on April 16, 17, and 18, 2018, could reasonably be used to deal with the issue of liability alone, recognizing that the parties are now adhering to the time table set out by Justice Duncan for document disclosure, affidavit evidence, expert evidence and oral discovery.

[24] In my view the issue of liability in this case of breach of contract and negligence does not turn on the Plaintiff's exact quantification of damages at this time. Through subsequent affidavit evidence, other disclosure, and expert reports, the trial judge hearing the Trial on liability alone would be required to satisfy his or herself that damages did accrue sufficient to sustain the action, the details of which are not so inextricably linked to the cause, that a Hearing on liability alone should not proceed.

[25] In my view this is one of those occasions that the court senses that severance could be efficacious to the ultimate resolution of the matter.

[26] When the issue of liability is resolved the parties could then, if required, engage their attention on the issues of damages; saving time and resources in the long run, as damages would actually be the more complex matter to attend to.

[27] I believe this could be done without significant duplication of time or cost.

[28] At this stage of the proceedings I do not see any issue of "substantial cost already incurred in both issues of liability and damages."

[29] On the issue of duplication of expert evidence, I accept that the nature of the expert evidence required for liability and damages would not be repetitive and would be different in nature.

[30] Although an appeal of a decision as to liability could involve delay, I do not find this a sufficient reason to conclude that a severance cannot be just and expedient in all the circumstances.

[31] I do not believe the Plaintiff's credibility is a significant issue.

[32] And further adhering to the time table set out by the Motion for Directions, will not result in or cause additional costs or delay in this proceeding, and could possibly shorten the proceedings or final determination of issues between the parties.

[33] I will allow the severance of the liability portion of the Plaintiff's claim and confirm the reserved dates for the Hearing on liability are April 16, 17, and 18, 2018, and the current dates for compliance with pre-hearing tasks. I will be happy to sign an order affirming the above.

Justice M. Heather Robertson