IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: TJ Inspection Services. v. Halifax Shipyard, 2004 NSSM 5
Claim No.: SCCH 222129

BETWEEN:

Name: **TJ Inspection Services** Claimant

- and -

Name: **Halifax Shipyard/Irving Shipbuilding Inc.** Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on October 3, 2006. This decision replaces the previously distributed decision

Counsel:
Claimant: Self Represented
Defendant: David Henley

D E C I S I O N

[1] This matter was initially heard on July 5, 2004. The Defendant had defended on the basis that there was no jurisdiction in this Court to deal with the invoices sued on by the Claimant. The Defendant referred to the Statement of Claim in the Supreme Court dated March 11, 2004, as well as the Defence and Counterclaim dated April 16, 2004, and asserted that the Small Claims Court was precluded by proceeding by virtue of Sections 9, 15, and 13 of the *Small Claims Court Act*.

[2] By Decision dated July 8, 2004, I ruled that the three invoices sued on in this Court were sufficiently separate and distinct from the Supreme Court action that on the authority of *Haines, Miller & Associates v. Fosse*(1996), 153 N.S.R. (2d) 44 (S.C.) and *Llewellyn Building Supplies Limited v. Nevitt* (1987), 80 N.S.R. (2d) 415 (C.C.), this Court had authority to severe the counterclaim issues from the Small Claims Court claim and hear the

Small Claims Court action. Accordingly, a hearing on the merits did proceed on August 10, 2004.

[3] Both James Zoher and Ted Monk gave evidence for the Claimant. For the Defendant, evidence was given by Al McEwan.

[4] Based on the evidence and indeed the submission of counsel for the Defendant, it is now clear that no issue is taken with the quality of the work provided under the three invoices which are sued on in this Court. No direct challenge is asserted against those amounts.

[5] The Defendant's defence is rooted solely in set-off. Counsel for the Defendant refers to three types of set-off: legal set-off, equitable set-off and set-off by agreement.

[6] In my view the first two can be dealt with rather summarily. Legal set-off was referred to in the case of *Atlantic Lines and Navigation Company v. The Ship "Didymi" et al* (1987), 39 D.L.R. (4th) 399 (Fed. C.A.) and is quoted in the Nova Scotia case of *Lever v. Positronic Software Inc.* (1996), 155 N.S.R. (2d) 197 (C.A.) (para. 8):

> *Set-off under statute (or legal set-off) authorized the set-off of cross claims arising out of separate transactions where they consisted of liquidated debts or money demands which could be ascertained with certainty at the time of the pleading.*

[7] It seems to me quite clear that the conditions of legal set-off, i.e. "liquidated debt" or "money demand" which can be ascertained with certainty at the time of pleading has not been shown here.

[8] Equitable set-off has been referred to by Lord Denning in the case of *Federal Commerce & Navigation Ltd. v. Molena Alpha Inc.*, [1978] 3 All. E.R. 1066, and again was quoted in the *Lever* case:

> *It is not every cross-claim which can be deducted. It only cross-claims that arise out of the same transaction or are closely connected with it and it is only the cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.*

[9] The claim in this case, is not, in my view, so "closely connected with the demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim". As noted in the earlier decision on jurisdiction, the invoices which are sued on Small Claims Court are separate and distinct matters and, indeed, it is acknowledged that there is no dispute as to the timeliness or quality of the work done under those invoices.

[10] The third type of set-off is set-off by agreement. In this regard the Defendant refers to the standard terms and conditions issued by the Defendant and in particular clause 3(b) which reads as follows:

> *Without prejudice to any other remedy which the Company may have under this Purchase Order or at law, the Company shall be entitled to deduct from any monies otherwise due or becoming due to the Seller under the Purchase Order any amount which the Seller owes, or is liable to the Company for, under this Purchase Order or any other purchase order or contract between the Seller and the Company.*

[11] The Defendant argues that this set-off clause applies to the invoices sued on in this Court and that the language is broad enough to capture the claim in question. Based on this the Defendant argues that the Small Claims Court can deal with this set-off defence by granting a stay of execution of any judgment in favour of the Claimant pending disposition of the Defendant's counterclaim in the Supreme Court action.

[12] As to the first point raised, I accept and agree with the Defendant's submission that the "set-off clause" in the standard terms and conditions does apply to these invoices, even though no such contractual document was issued with respect to the three invoices in question. It

seems to me that given the history between these parties which involved a large number of purchase orders being issued and a significant number of identical standard terms and conditions being issued as part of those purchase orders, I believe clause 3(b) would apply to any separate transaction, notwithstanding that the actual written document was not issued to the Claimant.

[13] As stated by counsel for the Defendant, based on the course of dealings between the parties, the "officious bystander" test leads to the conclusion that both parties would have objectively intended that the standard terms and conditions would apply.

[14] However, the further question is whether the language of the set-off clause captures the matters in dispute in the Supreme Court action. To use the language of the standard terms and conditions, the precise question would be whether the Claimant "...**owes or is liable** to the [Defendant] under...any other purchase order or contract", i.e. under the main purchase order which is the matter of dispute in the Supreme Court.

[15] In basic terms, in the Supreme Court action the Claimant is claiming some $$428,000.00 and alleging that the Defendant terminated the May 27, 2003, purchase order without cause. In defence, the Defendant alleges that the Claimant failed to perform the work to the standards and within the time required by the purchase order and as a result, it terminated the purchase order for cause. The Defendant then goes on to counterclaim for damages in the amount of $1,000,000.00.

[16] At this stage, all that the evidence demonstrates to me is that there are allegations on both sides of the issue in the Supreme Court proceeding. Of course, I have no jurisdiction to make any comment on those issues. However, I do have jurisdiction to interpret the language of paragraph 3(b) of the standard terms and conditions as they apply to the invoices sued on in this Court and determine what is a reasonable interpretation to apply to the word "owes or is liable to the company for".

[17] What the Defendant asks the Court to conclude is that under the clause in question the Company is entitled to deduct **any amount** which it **alleges** is owed by the Claimant under any other contract. There is no pre-determined mechanism to measure the strength of such an allegation that can be imposed into the contractual terms. Therefore, on such an interpretation, mere allegation is all that the Defendant would be required to demonstrate in order to avail itself of the offset clause. It seems to me that this is an unreasonable interpretation of the words in paragraph 3(b); that it could be interpreted to mean a mere allegation, without more, would justify the Company in deducting monies otherwise due under entirely separate contracts.

[18] I am supported in this conclusion by analogy to the law relating to the contractual exercise of discretion.

[19] In the case of *Dudka v. Smilestone* (1994), 131 N.S.R. (2d) 81 (S.C.), Justice Kelly referred to an article of Steven J. Burton in a discussion about good faith. He states (p. 93):

> *As part of his comprehensive discussion of the good faith doctrine in "breach of Contract and the Common Law Duty to Perform in Good Faith" in 94 Harv. L. Rev. 369, Steven J. Burton stated, at p. 373:*
>
> > *Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting - when the discretion-exercising party refuses to pay the expected cost of performance.* ***Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time for formation*** *- to capture opportunities that were preserved upon entering the contract, interpreted objectively.* [emphasis supplied]

[20] Although this present case does not concern good faith *per se*, it seems to me that this is a useful yardstick to apply to an interpretation of a contract. Particularly where, as here, one of the parties has the ability, at least purportedly has the ability, to exercise its discretion and

determine or at least allege, that amounts are due under a separate contract and apply those as set-off against a contract which is not, on its own, disputed or contested in any regard. Interpreting this objectively and considering the reasonable contemplation of the parties at the time of the formation of the contract, i.e. the purchase orders sued on in this Court, it seems to me that the party in the position of the Claimant here would not have given away such a significant right to the other party. Viewed in this fashion, the interpretation of the set-off ability has to have some restraint or limits.

[21] I would not say that the limit would be to "determined judgments" to use the language of counsel for the Defendant. It may be that an appropriate limit would be similar to the language which applies in a case of legal set-off, i.e. "a liquidated debt" or "money demand" which can be ascertained here, at least as I understand it, falls into those categories. As I understand the pleadings in the Supreme Court, they relate to consequential damages.

[22] In any event, it is not necessary for me to determine what the exact limit or parameter of the clause in question is. It is sufficient for me to conclude, and I do so conclude, that the term ought not to be interpreted to extend to an allegation of money owed or liable for in the Supreme Court proceeding.

[23] Based on the above, I would therefore rule in favour of the Claimants in the amount of $12,854.30, together with costs of $160.00.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on October , 2004.

Michael J. O'Hara
Adjudicator

Original Court File
Copy Claimant(s)
Copy Defendant(s)